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2612
No. 12412

United States
Court of Appeals
for the Ninth Circuit.

HALESTON DRUG STORES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition for Review of Order of the
National Labor Relations Board.

FILED

APR -5 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WILL H. MASTERS of
MASTERS & MASTERS,

Yeon Building,
Portland, Oregon,

Attorney for the Petitioner.

HERBERT GALTON,

Morgan Building,
Portland, Oregon,

Attorney for the Respondent.

United States of America
National Labor Relations Board

Case No. 36-CB-7

AMENDED CHARGE AGAINST LABOR
ORGANIZATION OR ITS AGENTS

Where a Charge Is Filed by a Labor Organization, or an Individual or Group Acting on Its Behalf, a Complaint Based Upon Such Charge Will Not Be Issued Unless the Charging Party and Any National or International Labor Organization of Which It Is an Affiliate or Constituent Unit Have Complied With Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an Original and 4 Copies of This Charge With the NLRB Regional Director for the Region in Which the Alleged Unfair Labor Practice Occurred or Is Occurring.

1. Labor Organization or Its Agents Against
- Which Charge Is Brought

Name: Waitresses and Cafeteria Women, Local #305; Cooks and Assistants Union, Local #207; Waiters Union, Local #189; Bartenders, Card and Poolroom Workers, Local #496; Local Joint Executive Board of the H.&R.E.I.A. and B.I.L.ofA.; and the Hotel Service Employees, Local 664.

Address: Portland, Oregon.

The Above-Named Organization(s) or Its Agents Has (Have) Engaged in and Is (Are) Engaging

in Unfair Labor Practices Within the Meaning of Section (8b) Subsection(s) 2 of the National Labor Relations Act, and These Unfair Labor Practices Are Unfair Labor Practices Affecting Commerce Within the Meaning of the Act.

2. Basis of the Charge:

(Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets.)

That said Unions are attempting to cause the employer to discriminate against his employees in violation of Subsection A(3) in that the said Unions are picketing one of the places of business of the said employer by attempting to enforce the employer to make his employees join said Unions and attempting to force the employer to sign a Union contract whereby all of his employees would be compelled to join the Unions or leave his employment and by handing out handbills in front of the other places of business of said employer, all of which actions contemplate the forcing of said employer to discriminate against his employees in forcing them to join a Union when said Unions do not represent a majority of his employees and are unable to be certified as the agent for his employees because they have not complied with the provisions of the National Labor Relations Act.

3. Name of Employer:

Haleston Drug Stores, a corporation.

4. Location of Plant Involved:

1003 S.W. Broadway; 1600 S.W. Morrison; 1102 S.W. 11th; 1320 S.W. Broadway.

5. Nature of Employer's Business:

Drug business and fountain lunch business.

6. No. of Workers Employed:

17.

7. Full Name of Party Filing Charge:

Haleston Drug Stores, a corporation.

8. Address of Party Filing Charge:

Oregonian Drug Co.

Broadway & Jefferson, Portland, Oregon.

9. Declaration:

I Declare That I Have Read the Above Charge and That the Statements Therein Are True to the Best of My Knowledge and Belief.

March 15, 1949.

By /s/ C. D. HALESTON,

(Signature of representative
or person making charge)
President.

Date Filed: 12-14-48.

Amended 3-15-49.

Received August 5, 1949.

United States of America, Before the National
Labor Relations Board, Nineteenth Region

Case No. 36-CB-7

In the Matter of

WAITRESSES AND CAFETERIA WOMEN'S
LOCAL No. 305, WAITERS LOCAL No. 189,
BARTENDERS, CARD & POOLROOM
WORKERS LOCAL No. 496, COOKS & AS-
SISTANTS LOCAL No. 207, HOTEL SERV-
ICE EMPLOYEES LOCAL No. 664, and
LOCAL JOINT EXECUTIVE BOARD OF
H. & R. E. I. A. AND B. I. L. OF A., com-
monly known as CULINARY WORKERS
ALLIANCE, Each Affiliated With Hotel &
Restaurant Employees and Bartenders Inter-
national Union, AFL,

and

HALESTON DRUG STORES, INC.

COMPLAINT

It having been charged by Haleston Drug Stores, Inc., that Waitresses and Cafeteria Women's Local No. 305, Waiters Local No. 189, Bartenders, Card & Poolroom Workers Local No. 496, Cooks & Assistants Local No. 207, Hotel Service Employees Local No. 664, and Local Joint Executive Board of H. & R. E. I. A. and B. I. L. of A, commonly known as Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders In-

ternational Union, AFL, the Respondents herein, have engaged in and now are engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended (61 Stat. 136), hereinafter called the Act, the General Counsel of the National Labor Relations Board, hereinafter called the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges as follows:

I.

Haleston Drug Stores, Inc., hereinafter called the Employer, is a business enterprise incorporated and existing by virtue of the laws of the State of Oregon, and has its principal place of business in Portland, Oregon.

II.

The Employer has been and is engaged principally in operating four retail drug stores in the City of Portland, Oregon, commonly known as St. Francis Drug Store, New Heathman Hotel Drug Store, Comondore Drug Store, and Oregonian Drug Store. Annually the Employer makes purchases of drugs and merchandise for resale totaling approximately \$190,000, of which approximately 30 per cent is shipped to the Employer directly from points outside the State of Oregon, and of the remainder approximately 60 to 75 per cent are purchases made within the State of Oregon of goods

that originated outside of said State. Annually the Employer sells merchandise and drugs totaling in value approximately \$325,000, all of which sales are made locally at the Employer's drug stores.

III.

The Employer is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

IV.

Waitresses and Cafeteria Women's Local No. 305, hereinafter referred to as the Waitresses Local, Waiters Local No. 189, hereinafter referred to as the Waiters Local, Bartenders, Card & Poolroom Local No. 496, hereinafter referred to as the Bartenders Local, Cooks & Assistants Local No. 207, hereinafter referred to as the Cooks Local, Hotel Service Employees Local No. 664, hereinafter referred to as the Hotel Service Employees Local, and Local Joint Executive Board of H. & R. E. I. A. and B. I. L. of A., hereinafter referred to as the Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders International Union, in turn affiliated with the American Federation of Labor, each is a labor organization within the meaning of Section 2 (5) of the Act.

V.

Neither the Waitresses Local, nor the Waiters Local, nor the Bartenders Local, nor the Cooks Local, nor the Hotel Service Employees Local, nor the Culinary Workers Alliance has been certified

by the Board pursuant to the provisions of Section 9 (e) of the Act as having been authorized by a majority of the Employer's employees in any unit of the Employer's operations to negotiate in behalf of said employees a collective bargaining agreement which provides for membership in any of said labor organizations as a condition of employment under any circumstances.

VI.

On or about September 15, 1948, the Respondent Unions solicited the Employer to execute a collective bargaining agreement applicable to employees then employed and later to be employed at the Oregonian Drug Store, which agreement contained the following clauses:

2. During the life of this Agreement, the Employer will not employ in his establishment any person not a member in good standing of one of the Unions.

3. All new employees shall be secured by the Employer through the Union's offices.

The Respondent Unions were collectively identified as the Union in said proposed agreement.

VII.

The Employer, on said date and thereafter until the present date, did not agree and has not agreed to become a party to such agreement.

VIII.

On or about September 29, 1948, the Respondent

Unions caused the Employer and each of its stores aforesaid to be declared unfair to organized labor by the Central Labor Council of Portland and Vicinity, a labor organization, and the name of the Employer and of each of its stores to be published by said organization on its "Unfair List," and publicized thereafter until the present date as being unfair to organized labor.

IX.

On or about September 29, 1948, and thereafter until the present date, Respondent Unions have engaged in picketing the premises of the Oregonian Drug Store, and have caused the pickets to carry a banner on which appears in substance a statement that the Employer has been and is unfair to the Respondent Unions.

X.

During the period immediately preceding Christmas, 1948, Respondent Unions caused hand bills to be distributed to prospective patrons of the Employer at the approaches to the four drug stores of the Employer, again declaring the Employer to be unfair to organized labor and urging the prospective patrons not to patronize said stores.

XI.

The Respondent Unions have engaged in the conduct described in Paragraphs VIII, IX, and X, to cause the Employer to execute and become a party to the agreement described in Paragraph VI.

XII.

The Respondent Unions, by their conduct described in Paragraphs VI and VIII to XI, inclusive, have attempted to cause the Employer to discriminate against employees in regard to hire and tenure of employment, or the terms or conditions of employment, to encourage membership in the Respondent Unions and to discourage employees from exercising their rights to refrain from such concerted activity.

XIII.

The Respondent Unions, by their conduct and the acts described in Paragraphs VI and VIII to XII, inclusive, under the circumstances described in Paragraphs V and VII, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

XIV.

The acts and conduct of the Respondent Unions as hereinabove set forth, affecting the operation of the Employer as described in Paragraphs I, II, and III above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States of the United States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XV.

The aforesaid acts and conduct of the Respondent Unions as set forth above, constitute unfair labor practices affecting commerce within the meaning

of Section 8, subsection (b) (2), and Section 2, subsection (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, acting by and through the Regional Director for the Nineteenth Region of the Board, on this 2nd day of August, 1949, issues this Complaint against Waitresses and Cafeteria Women's Local No. 305, Waiters Local No. 189, Bartenders, Card & Pool-room Workers Local No. 496, Cooks & Assistants Local No. 207, Hotel Service Employees Local No. 664, and Local Joint Executive Board of H. & R. E. I. A. and B. I. L. of A., commonly known as Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL, the Respondent Unions herein.

[Seal] /s/ KENNETH McCLASKEY,

Acting Regional Director, 19th Region, National Labor Relations Board, 515 Smith Tower, Seattle 4, Washington.

[Title of Board and Cause.]

MOTION FOR AN ORDER DISMISSING THE COMPLAINT

Come now the respondents in the above-entitled case and move for an order dismissing the complaint, on the ground and for the reasons:

1. That the employer involved is not engaged in an operation in commerce or affecting commerce.

2. That, even if it does affect interstate commerce, it would not effectuate the policies of the act to exercise jurisdiction.

See *In re Haleston Drug Store, Inc., and Retail Clerks International Association, Local 1092*, 82 NLRB 148, case No. 36-RM-26, April 15, 1949.

The respondents particularly urge that this case be dismissed forthwith, for the reason that testimony has already been taken in a previous representation case, and the Board has already decided not to exercise jurisdiction in this case. We therefore think that this is an appropriate case to be summarily dismissed, so that the parties will not be put to great time and expense to defend a frivolous case.

Dated this 3rd day of August, 1949.

GREEN, LANDYE &
RICHARDSON,

Attorneys for Respondents.

State of Oregon,
County of Multnomah—ss.

I, James Landye, one of attorneys for the respondents named herein, hereby certify that I have served a copy of the within motion by registered

mail upon Will H. Masters, attorney for Haleston Drug Stores, Inc., on the 3rd day of August, 1949.

/s/ JAMES LANDYE,
Of Attorneys for
Respondents.

Received August 5, 1949.

[Title of Board and Cause.]

ANSWER TO RESPONDENTS

Come now the respondents and in answer to the Complaint filed herein, allege, deny and admit as follows:

I.

Respondents have no information on which to base a belief as to Paragraphs I and II and therefore deny the same.

II.

As to Paragraph III, respondents deny said paragraph and further allege that even if such defendant is engaged in commerce within the meaning of the Act, it would not effectuate the purposes of the Act for the Board to assume jurisdiction herein.

III.

Admit Paragraphs IV and V.

IV.

Deny Paragraph VI and VII.

V.

Admit Paragraph VIII.

VI.

Deny Paragraphs IX, X, XI, XII, XIII, XIV, XV.

Wherefore the respondents, having answered the Complaint herein, request that the National Labor Relations Board find that said respondents have not been guilty of an unfair labor practice affecting commerce within the meaning of Section 8(a) (1) of the Labor-Management Relations Act of 1947, and that this action be dismissed with regard to said respondents.

GREEN, LANDYE &
RICHARDSON,

Attorneys for Respondents.

State of Oregon,
County of Multnomah—ss.

I, Cecil Jones, being first duly sworn, depose and say that I am Secretary of the Cooks & Assistants Local No. 207, one of respondents herein, and that the foregoing Answer is true as I verily believe.

CECIL JONES.

Subscribed and sworn to before me this 11th day of August, 1949.

JAMES LANDYE,

Notary Public for Oregon.

My commission expires Dec. 7, 1951.

A truly copy:

/s/ JAMES LANDYE,

Of Attys. for Respondents.

[Title of Board and Cause.]

ORDER DESIGNATING TRIAL EXAMINER

It Is Hereby Ordered that Charles W. Whittemore act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 5, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., August 11, 1949.

[Seal] /s/ WILLIAM E. SPENCER,
Acting Chief Trial Examiner.

[Title of Board and Cause.]

ORDER

The respondents having filed a motion to dismiss the complaint in this proceeding, and the Board having determined that the motion should be ruled upon pursuant to Section 203.25 of the Rules and Regulations of the Board,

It Is Hereby Ordered that the respondents' motion be, and it hereby is, referred to the Division of Trial Examiners for action pursuant to provisions of Section 203.25 of the Rules and Regulations.

Dated, Washington, D. C., August 10, 1949.

By direction of the Board:

/s/ FRANK M. KLEIFAR,
Executive Secretary.

[Title of Board and Cause.]

ORDER

Charges having been heretofore filed;

A complaint and notice of hearing having been issued on August 2, 1949, by the General Counsel of the National Labor Relations Board, by the Regional Director for the Nineteenth Region;

A motion having been filed with the Chief Trial Examiner on August 3, 1949, by the Respondents (Waitresses and Cafeteria Women's Local 305, et al.); urging summary dismissal of the complaint on the grounds:

1. That the employer involved is not engaged in an operation in commerce or affecting commerce.

2. That even if it does affect commerce, it would not effectuate the policies of the Act to exercise jurisdiction;

Said Respondents having, on August 5, requested that said motion be transferred to the Board for consideration;

Said motion having been referred by the Acting Chief Trial Examiner to the Board on August 9;

The Board, on August 10, having ordered: (1) that said motion be ruled upon pursuant to Section 203.25 of the Rules and Regulations of the Board, and (2) that said motion be referred to the Division of Trial Examiners;

The undersigned Trial Examiner having been duly designated by the Acting Chief Trial Examiner;

Said motion to dismiss having been referred to said Trial Examiner on August 11 for ruling pursuant to Section 203.25 of the Rules and Regulations;

Now, Therefore, the said Trial Examiner, being fully advised in the premises, having duly considered the matter, particularly the commerce allegations in the complaint, and having taken official notice of the findings and conclusions of the Board in Matter of Haleston Drug Stores, Inc., Case No. 36-RM-26, decided April 15, 1949, wherein the Board, without deciding whether or not the employer's operation affects commerce within the meaning of the National Labor Relations Act, concluded that "it would not effectuate the policies of the Act to exercise jurisdiction"; it is hereby:

Ordered that said motion for dismissal of the complaint be, and it hereby is, granted.

/s/ CHARLES W. WHITTEMORE,
Trial Examiner.

Signed at Washington, D. C., this 11th day of August, 1949.

Dated August 15, 1949.

[Title of Board and Cause.]

**MOTION TO RECONSIDER ORDER OF
TRIAL EXAMINER**

To: Chief Trial Examiner, Washington 25, D. C.
Comes now the Haleston Drug Stores, Inc., and

moves the Chief Trial Examiner to cause the Trial Examiner, Charles W. Whittemore, to reconsider his order which was made and entered August 11, 1949, granting the motion of respondents to dismiss the complaint in the above-entitled matter and dismissing said complaint for the reasons that:

1. Said Haleston Drug Stores, Inc., was prepared to introduce evidence to prove that said Haleston Drug Stores, Inc., was engaged in interstate commerce and engaged in operations affecting commerce as is set forth in Affidavit hereto attached, marked Exhibit "A," referred to and made a part hereof, and was prepared as is shown by said Affidavit to introduce additional evidence than that introduced in the case of Haleston Drug Stores, Inc., and International Retail Clerks, Food and Drug Clerks, Local 1092, AFL, case No. 36-RM-26, and that said Trial Examiner had no evidence before him at the time of making said order.

2. That said Trial Examiner's order is erroneous in that in the above-entitled case there are different parties than in the case of No. 36-RM-26 and that the holding of said Case No. 36-RM-26 is not a determination of the issues in the above-entitled case.

MASTERS and MASTERS,
By WILL H. MASTERS,
Attorneys for Haleston Drug
Stores, Inc.

EXHIBIT "A"

State of Oregon,
County of Multnomah—ss.

I, C. D. Haleston, being first duly sworn depose and say:

That I am the President of Haleston Drug Stores, Inc. That Haleston Drug Stores, Inc., operates four drug stores in the City of Portland, namely: The Oregonian Drug Co., Broadway and Jefferson Street, Portland, Oregon; the New Heathman Drug Co., New Heathman Hotel, Broadway and Salmon Streets, Portland, Oregon; St. Francis Hotel Drug Co., S. W. 11th and Main Streets, Portland, Oregon; and the Commodore Hotel Drug Co., in the Commodore Hotel, S. W. 16th and Morrison Street, Portland, Oregon, and for eleven months of 1948, the Terminal Drug Co. in Portland, Oregon, which drug store was discontinued and the stock in trade was moved to the other drug stores. That all of said drug stores sell the conventional line of drugs, medicines and cosmetics, operate a soda fountain lunch and prepare medical prescriptions.

I further say that the gross dollar volume of purchases of all of the stores operated by the Haleston Drug Stores, Inc., is the sum of \$323,938.54. That of these purchases, \$64,744.95, or 19.987%, was purchased wholly outside the State of Oregon; \$76,063.68, or 23.481%, was purchased from firms operating wholly without the State of Oregon but which goods were supplied from warehouses situate

the order of the Trial Examiner granting the motion to dismiss the complaint in the above-entitled proceeding.

On August 3, 1949, a motion was filed with the Board urging summary dismissal of the complaint for the reasons (1) that the Employer involved is not engaged in an operation in commerce or affecting commerce, and (2) that even if it does affect commerce, it would not effectuate the policies of the Act to exercise jurisdiction. On August 10, 1949, the Board ordered that said motion be referred to the Division of Trial Examiners for disposition pursuant to Section 203.25 of the Rules and Regulations of the Board. On August 11, 1949, the Trial Examiner issued an order granting the motion to dismiss the complaint on the ground that "whether or not the Employer's operation affects commerce within the meaning of the National Labor Relations Act . . . 'it would not effectuate the policies of the Act to exercise jurisdiction.' "

In justification of his ruling, the Trial Examiner relied on the conclusions and findings of the Board in a prior representation proceeding involving the same employer. Matter of Haleston Drug Stores, Inc., Case No. 36-RM-26, decided April 15, 1949. In that case the Board, without deciding whether the Employer's operation affects commerce within the meaning of the Act, dismissed the petition on the ground that inasmuch as the Employer's business is essentially local in character, it would not effectuate the policies of the Act to assert jurisdic-

tion. The General Counsel submits that the Trial Examiner erred (1) in failing to find that the Employer's operation affects commerce within the meaning of the Act, and (2) in refusing to exercise jurisdiction even though such jurisdiction exists in fact.

United States of America, Before the
National Labor Relations Board

Case No. 36-CB-7

In the Matter of

WAITRESSES AND CAFETERIA WOMEN'S
LOCAL NO. 305, WAITERS LOCAL NO. 189,
BARTENDERS, CARD & POOL ROOM
WORKERS LOCAL NO. 496, COOKS & AS-
SISTANTS LOCAL NO. 207, HOTEL SERV-
ICE EMPLOYEES LOCAL NO. 664, AND
LOCAL JOINT EXECUTIVE BOARD OF
H. & R.E.I.A. AND B.I.L. OF A., commonly
known as CULINARY WORKERS ALLI-
ANCE, each affiliated with HOTEL & RES-
TAURANT EMPLOYERS AND BARTEND-
ERS INTERNATIONAL UNION, AFL,

and

HALSTON DRUG STORES, INC.

DECISION AND ORDER

On August 11, 1949, Trial Examiner Charles W. Whittemore issued his order granting the motion

of the Respondents for dismissal of the complaint in the above-entitled proceeding on the ground that the assertion of jurisdiction over the operations of the Employer involved would not effectuate the policies of the Act. Thereafter the General Counsel filed a timely Request for Review of the Trial Examiner's order, pursuant to Section 203.27 of the Board's Rules and Regulations, Series 5, as amended. The Board has considered the entire record in this proceeding, including the arguments advanced by the parties.¹ For the reasons hereinafter stated, the order of the Trial Examiner dismissing the complaint is affirmed.

I. The Trial Examiner's order

In dismissing the complaint on the ground that the assertion of jurisdiction would not effectuate the policies of the Act, the Trial Examiner relied on our dismissal of a representation petition by the Employer involved herein, in *Matter of Haleston Drug*

¹The Employer filed a motion for reconsideration of the Trial Examiner's order with the Chief Trial Examiner, and filed exceptions to the order with the Board. Section 203.27 of the Board's Rules and Regulations provides that review of a Trial Examiner's order dismissing a complaint before issuance of an Intermediate Report may be had upon a request for review addressed to the Board. In view of the fact that the case is properly before us on the General Counsel's Request for Review, filed in accordance with the Board's Rules and Regulations, we have fully considered all the issues raised by the Employer's motion and exceptions.

Stores, Inc.² The Employer and the General Counsel contend that the dismissal without hearing is erroneous because it precluded the possibility of taking evidence on the commerce question. We find no merit in this contention. Like the Board, the Trial Examiner may take official notice of the record and findings of the Board in prior proceedings involving the same parties.³ It cannot, therefore, be said that the order of the Trial Examiner was not based on evidence.

In any event, for present purposes we shall assume the truth of the additional facts which the Employer and the General Counsel offer to prove concerning the relationship of the Employer's business to commerce. The amounts of the various transactions differ quantitatively from those which appear in the record of the representation proceeding. Nevertheless they still show no more than that the Employer operates a chain of retail drug stores in Portland, Oregon, making substantial out-of-State purchases but selling all of its merchandise locally.⁴

²82 N. L. R. B., No. 148.

³86 N. L. R. B., No. 125.

³It is immaterial that the same unions were not involved in both proceedings. The jurisdictional facts upon which the commerce finding was based are those relating to the business of the Employer, who is the same in both cases.

⁴The fact that the Employer makes an unspecified quantity of sales to transients from out of the State who may be staying at the hotels in which its stores

That is precisely the situation that presented itself in the representation case. Retail drug stores are essentially local operations, and in such cases we have frequently declined to assert jurisdiction where the only factor in favor of doing so was a substantial volume of out-of-State purchases.⁵ Accordingly we see no reason to reverse our earlier finding with respect to this Employer.⁶

II. The discretion of the Board to dismiss a complaint

However, the General Counsel's attack upon the Trial Examiner's order goes beyond the jurisdictional facts in this particular case. It is vigorously contended again that, once the General Counsel has issued a complaint, this Board is without discretion to dismiss a complaint solely because it believes that

are located does not establish a substantial volume of out-of-State sales sufficient to require us to reverse our earlier finding.

⁵See Matter of Sta-Kleen Bakery, Inc., 78 N. L. R. B. 798; Matter of Fehr Baking Company, 79 N. L. R. B. 440; Matter of Creamland Dairies Inc. 80 N. L. R. B., No. 21.

⁶While our findings of fact are not *res judicata* in any other proceeding, we will ordinarily not reverse them in the absence of some compelling consideration, such, for example, as a material change in circumstances. See Matter of Atlanta Brick and Tile Company, 83 N. L. R. B., No. 166; cf. Matter of Transit Casualty Company, 83 N. L. R. B., No. 128.

to assert jurisdiction would not effectuate the policies of the Act. The question of our power to dismiss a complaint for such reasons was considered and discussed at some length in our opinion in the A-1 Photo case,⁷ in which we affirmed the existence of that power. Since that opinion was issued, however, additional arguments bearing upon this issue, including those urged by the General Counsel in the instant case, have been presented to us. We consider it appropriate at this time to reappraise this problem in the light of some of the arguments which have been made, and to remove any misunderstanding that may exist as to the purport of the Board's unanimous decision in the A-1 Photo case.

First, a word of history, so that the issue may be viewed in proper perspective. Under the provisions of the original National Labor Relations Act, the Board exercised ultimate supervision over all steps in the procedural process before the Board and the courts, from the investigation of charges and the issuance of complaints to court application for the enforcement of its orders. In the exercise of its discretion, the Board could decline to issue complaints.⁸ After the issuance of a complaint and after hearing, it retained the lawful discretion, inherent in its function of administering the Act, to

⁷Matter of Local 905 of the Retail Clerks International Association (AFL), et al. (H. W. Smith d/b/a A-1 Photo Service), 83 N. L. R. B., No. 86.

⁸N. L. R. B. v. Indiana & Michigan Electric Company, 318 U. S. 9, 18-19.

dismiss a complaint for policy reasons.⁹ It also had broad discretion to determine the remedy, if any, which would effectuate the policies of the Act.¹⁰ Finally, the statute left it to the Board's discretion to determine whether or not to seek enforcement of its orders in the courts.¹¹

In short, the Board was permitted to make policy determinations at every stage of a proceeding. There was nothing unique in the existence of this

⁹N. L. R. B. v. Indiana & Michigan Electric Company, *supra*; N. L. R. B. v. Federal Engineering Company, Inc., 153 F. 2d 233, 234 (C. A. 6); Bethlehem Steel Company v. New York State Labor Relations Board, 330 U. S. 767, 776; Matter of Midwest Piping and Supply Co., Inc., 63 N. L. R. B. 1060; Matter of Brown & Root, Inc., 51 N. L. R. B. 820; Matter of Consolidated Aircraft Corp., 47 N. L. R. B. 69; Matter of Wickwire Brothers, 16 N. L. R. B. 316; Matter of Godechaux Sugars, Inc., 12 N. L. R. B. 568.

¹⁰Phelps Dodge Corporation v. N. L. R. B. 313 U. S. 177, 194-195; International Association of Machinists v. N. L. R. B. 311 U. S. 72, 82; Matter of The Ebco Manufacturing Company, 67 N. L. R. B. 210; Matter of Providence Gas Company, 41 N. L. R. B. 1121; Matter of Shenandoah-Dives Mining Company, 11 N. L. R. B. 885; S. Rep. 573, 74th Cong., 1st Sess. p. 15.

¹¹Section 10 (e) of the original Act carried over unchanged in the amended Act provides: "The Board shall have power to petition any circuit court of appeals . . . for the enforcement of such order. . . ." (Emphasis supplied.) See also N. L. R. B. v. Sunshine Mining Co., 125 F. 2d 757 (C. A. 9).

permissive power in the Board. Indeed, the presence of this discretion in the administrative agency charged with responsibility for effectuating the policy of a public statute is the hallmark of the administrative process. It is this very characteristic which distinguishes an administrative agency from a court of law. The latter adjudicates private rights according to the law of the land. It is not generally concerned with policy.¹² But an administrative agency, by its very nature, is governed by policy considerations, because it is concerned with public and not private rights.¹³ Hence, it must al-

¹²But even a Federal court is not without discretion to refuse to exercise existing jurisdiction. See *Meredith v. City of Winter Haven*, 320 U. S. 228, for a discussion of some of the instances where the exercise of such discretion may be justified by considerations of paramount public policy. And cf. 28 U.S.C.A., sec. 1254, defining the discretionary certiorari jurisdiction of the Supreme Court.

¹³Administrative agencies "do more than judicially and impartially apply the law as they find it to a controversy between private parties; they are charged with the carrying out of definite policies involving discretion and the formulation of subordinate policies to effectuate the purpose of the laws which they administer. The courts, on the other hand, take the law as they find it without any particular obligation to accomplish a particular public purpose or secure a certain result." Pillsbury, "Administrative Tribunals," 36 Harv. L. Rev. 405, 423 (1922). See also Chamberlain, *The Judicial Function in Federal Administrative Agencies* (1942) p. 55. In deciding upon a remedy, the Su-

ways have a large measure of discretion in discharging its functions. For this reason, cases which hold that when a law court has jurisdiction, it must exercise it, and that when it finds a violation of law it must grant a remedy, are inapplicable to an administrative tribunal such as this Board.

It is true, of course, that the 1947 amendments to the Act modified the Board's structure to the extent that they created the statutory office of General Counsel and gave to him

final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, . . .

But there is no evidence either in the legislative history of the Labor Management Relations Act, or in the language of the Act itself, which indicates a purpose to change the entire character of the Board from a quasi-judicial agency to a pure court of law, hedged about with all the rigidities and limitations of such a tribunal.

In the new legislation, Congress was concerned only with separating the prosecuting and adjudicating functions within the Board. This Congress accomplished, by creating the office of General Counsel, to whom it transferred the investigatory and

preme Court has admonished the Board that it must consider not only the policy of the Act, but that of other statutory enactments. *Southern Steamship Company v. N. L. R. B.* 316 U. S. 31, 46.

prosecuting functions previously vested in the Board, with all accompanying discretion. For the rest, the structure and powers of the Board remained substantially unchanged. There is no basis for an inference that under these circumstances Congress intended to remove from the Board the discretionary authority it had previously exercised as an incident of its adjudicating function,¹⁴ including its power to dismiss a complaint, after hearing, for reasons of policy. The Board Members may no longer exercise a discretionary judgment at the beginning of an unfair labor practice proceeding. But this is a far cry from saying that they may not do so at subsequent stages of the proceeding, when the case is properly before them, or that the prosecutor's original exercise of discretion is binding on all persons for all time.

To sum up, then, the effect of the amendments: The General Counsel has the unfettered discretion to determine whether to issue a complaint and how to prosecute it. However, once the complaint has issued and the case has been submitted to the Board for decision, the "final authority" of the General Counsel is exhausted. Any action which the Board may take thereafter does not constitute a review of the independent portion of the General Counsel's authority. The Board may, as heretofore, dismiss a complaint because it believes the legal theory urged in support of the case inapplicable, or that the factual allegations of the complaint are un-

¹⁴*Queensboro Farms Products, Inc. v. Wickard*, 137 F. 2d 969, 977 (C.A. 2).

proved, or that the policy of the Act will not be effectuated by entertaining jurisdiction. The power to dismiss a complaint—whether for legal or policy reasons—is inherent in the Board's very function of administering the Act. There is no more encroachment on the General Counsel's original authority because the Board ultimately dismisses a complaint for policy reasons, than when it dismisses a complaint because the case has not been proved.¹⁵ Both the Board and the General Counsel are supreme within their respective statutory spheres: that of the General Counsel lies in investigating and prosecuting complaint cases; that of the Board in deciding such cases according to law and policy. The Board has neither desire nor authority to trespass upon the domain of the General Counsel; but neither may the General Counsel encroach upon the area continued to be entrusted to the Board.

For all the reasons given herein, we reaffirm the finding made in a A-1 Photo case, that the Board has discretionary authority under the Act to dismiss a complaint for policy reasons, that the existence of such discretion is not incompatible with the statutory power of the General Counsel to initiate proceedings by issuing complaints, and that that discretion is properly exercised where, as in this case,

¹⁵Senator Taft said in his supplementary analysis of the conference bill; "So far as having unfettered discretion he [the General Counsel], of course, must respect the rules of decision of the Board and of the courts." 93 Cong. Rec. 7000 (June 12, 1947).

we find that interruption of the Employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce. We shall therefore affirm the Trial Examiner's order dismissing the complaint.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Waitresses and Cafeteria Women's Local No. 305, Waiters Local No. 189, Bartenders, Card & Pool-room Workers Local No. 496, Cooks & Assistants Local No. 207, Hotel Service Employees Local No. 664, and Local Joint Executive Board of H. & R.E.I.A. and B.I.L. of A., commonly known as Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL, be, and it hereby is, dismissed.

Signed at Washington, D. C., this 31st day of Oct. 1949.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, JR.,
Member.

ABE MURDOCK,

Member.

J. COPELAND GRAY,

Member.

[Seal]

National Labor Relations Board.

Before the National Labor Relations Board
Nineteenth Region

Case No. 36-RM-26.

In the Matter of

HALESTON DRUG STORES

and

INTERNATIONAL RETAIL CLERKS FOOD
AND DRUG CLERKS, LOCAL 1092, AFL

Monday, January 10, 1949

Pursuant to notice, the above-entitled matter came
on for hearing at 10:00 a.m.

Before: Eleanor Nygren,
Hearing Officer.

Appearances:

WILL H. MASTERS of
MASTERS & MASTERS,

Yeon Building,

Portland, Oregon,

representing the petitioner.

HERBERT GALTON,

Morgan Building,

Portland, Oregon,

representing International Retail
Clerks, Food and Drug Clerks, Local
Number 1092, AF of L.

* * *

PROCEEDINGS

CHRIS HALESTON

a witness called by and on behalf of the Petitioner,
being first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. Masters:

Q. Will you state your name?

A. Chris Haleston.

Q. You are the president of the Haleston Drug
Stores, Inc.?

A. Yes.

Q. An Oregon corporation?

A. Yes, sir.

Q. And this Haleston Drug Stores operates how
many stores in the city of Portland, Oregon?

A. Four drug stores.

Q. What are the names and addresses of them?

A. The Heathman Hotel Drug Store, 1003 South-
west Broadway. St. Francis Hotel Drug Store,
1102 Southwest 11th. Commodore Hotel Drug Store,
1601 Southwest Morrison. And the Oregonian Drugs
at 1304 Southwest Broadway.

(Testimony of Chris Haleston.)

Q. Does the Haleston Drug Stores buy the supplies for all these drug stores?

A. The headquarters at the Heathman Hotel Drug Store, we buy all supplies for the four stores, outside of local merchandise that is delivered directly.

Mr. Masters: I would like to have this marked.

(Document marked Petitioner's Exhibit Number 1 for identification.)

Q. Handing you Petitioner's Exhibit Number 1, I ask you to state what that is.

A. This is a list of merchandise we bought since the first of the year.

Hearing Officer Nygren: The first of which year?

The Witness: The first of 1948, from firms out of State bought direct.

Q. From the first of January, 1948, to the first of January, 1949?

A. Until about the 15th of December.

Q. Until about the 15th of December, 1948. And does that also have a total on it of total purchases?

A. It has total purchases of \$189,157.39. Purchases out of State \$57,026.03.

Q. What percentage is this?

A. It is figured a percentage of about 30.15 per cent of out-of-State purchases.

Mr. Masters: I will offer that in evidence.

(Testimony of Chris Haleston.)

(Thereupon, the document marked Petitioner's Exhibit Number 1 for identification was offered in evidence.)

PETITIONER'S EXHIBIT NO. 1

55,416.87	Total	30.10%
197.55	Pyramid Rubber Co.	
43.32	Chas. A. Phillips Co.	
28.73	Dr. W. B. Caldwell Co.	
21.60	Woodburn & Co.	
518.20	The Toni Co.	
64.78	Imperial Candy Co.	
143.81	Harriet Hubbard Ayer	
49.50	American Safety Razor Co.	
112.92	Abbott Laboratories	
168.53	Bourjois, Inc.	
127.20	The Borden Company	
41.58	Harry Brown Confections	
23.76	Brown & Haley Tobacco Co.	
20.00	Chap Stick Co.	
314.85	Caron Corporation	
108.90	Parfums Ciro, Inc.	
55.80	Colonial Dames, Inc.	
456.88	Colgate P. O. Peet Co.	
15.93	Ceufit Sales Corp.	
40.92	D'Orsay Sales Co.	
30.00	Deadem, Inc.	
106.42	Dana Perfumes	
138.00	Irvin Freidman	

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

9.00	The De Vilbiss Co.
93.66	Florence Distributing Co.
49.60	F. W. Fitch Co.
164.55	Eversharp Company
137.25	Elgin American
343.57	Eastman Kodak Company
57.60	Barbara Gould
653.61	Gibson Art Co.
35.64	International Distributors
19.60	Iodent Chemical Co.
44.55	Imperial Candy Co.
112.19	Hudnut Sales Co.
124.27	Lucien LeLong
53.10	Lentheric, Inc.
51.76	Mycraft Prod., Inc.
61.56	Alfred D. McKelvy Co.
129.62	Modglin Company
14.40	Millers Forge
14.12	S. E. Massengell Co.
19.60	Noxema Chemical Co.
77.76	Owens Brush Co.
46.80	Ogilvia Sisters
42.61	Pressmaster Co.
44.03	Prophylatic Brush Co.
106.53	Pereline Works
95.85	Stephen Riley Co.
72.62	Charles Koppel Co.
37.62	Rogers Candy Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

14.12	Anatole Robbins
72.15	Evyan Ltd.
194.23	So. Calif. Pen Co.
23.21	W. A. Shaffer Pen Co.
107.20	Stowall & Co.
160.57	Starite-Ginnie Son
183.46	S. & K. Sales Co.
78.30	Jean Vivadon
11.25	Thalson Company
12.86	Tacoma Drug Co.
90.10	Winthrop Stearns
71.15	J. B. Williams Co.
335.16	Stephen F. Whitman & Son
31.82	Weeks & Leo Co.
36.58	Northam Warren Copr.
62.24	Woodburn Co.
152.38	Wyeth, Inc.
241.65	Yardley of London
49.38	Zonite Corp.
82.67	Hughes Brushes, Inc.
3.64	"42" Products
109.19	Vicks Chemical Co.
254.72	Associated Sales Co.
1,709.46	Teletone Natl. Corp.
271.86	Shulton, Inc.
173.69	The Bayer Co.
28.44	Peggy Sage
60.76	Tampax, Inc.
601.89	Colgate P. O. Peet Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

55.13	Colonial Dames, Inc.
13.72	Eastman Kodak Co.
82.67	Hughes Brush Co.
97.50	Imperial Candy Co.
76.88	Ogilvia Sisters
482.70	E. R. Squibb Co.
110.96	The Upjohn Company
36.58	Northam Warren Corp.
189.14	Brown & Haley Tobacco Co.
77.93	D'Orsay Sales Co.
77.06	Eastman Kodak Co.
49.98	Ever Dry Corp.
107.43	Empire Leather Goods
101.89	Houbigant Sales Corp.
64.87	Thomas Tuming & Co.
88.86	The Murine Co.
65.34	The Pepsodent Co.
127.31	Prophylatic Brush Co.
58.31	Chas. H. Phillips Co.
18.00	Wadburn & Co.
49.30	The R. L. Watkin Co.
117.40	Vick Chemical Co.
12.42	Bourjois, Inc.
56.36	Coco Cola Co.
484.50	Colgate P. O. Peet Co.
54.00	Wnader & Co.
10.20	American Optical Co.
24.70	Colonial Dames, Inc.
26.01	Coronet Toy Mfg. Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

.47	Carel Laboratories
90.30	Eastman Kodak Co.
33.33	"42" Products, Ltd.
58.80	Evyar Ltd.
94.20	Jerry Elsner Co.
99.88	Barbara Gould
13.31	Imperial Candy Co.
44.60	The Kurlash Co., Inc.
29.05	Lucien LeLong, Inc.
64.57	Thos. Luming Co.
46.50	Noxema Chemical Co.
33.87	Natone Company
78.85	The Penslar Co.
152.36	The Pepsodent Co.
40.00	Pharmasco, Inc.
4.62	Rainbow Plastics
175.21	Roger & Gallet
222.85	Revlon Corp. of Calif.
67.40	Shulton, Inc.
181.24	W. A. Shaeffer Pen Co.
287.64	S. & K. Sales Co.
68.65	R. B. Semler, Inc.
85.80	Stowall & Company
81.44	M. Seller Co.
297.83	E. R. Squibb Co.
7.50	Salens Radio Service
329.28	Scholl Mfg. Co.
108.00	Paggy Sage, Inc.
73.63	Serutan Company

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

19.50	Thalson Co.
559.78	The Toni Co.
172.80	The Toni Co.
300.63	The Upjohn Co.
120.00	J. B. Williams Co.
54.00	Wander Co.
68.66	Winthrop Stearns, Inc.
140.70	Wyeth, Inc.
222.59	Whitehall Pharm. Co.
26.98	L. E. Waterman Co.
48.03	Zonite Prod. Corp.
113.00	Andrew Jergens Co.
12.53	Elmo Sales Corp.
1.05	Eversharp, Inc.
263.50	Grove Laboratories
68.99	Houbigant Sales Corp.
38.76	Conti Products
111.69	Whitehall Pharmacal Co.
520.89	Parker Pen Co.
693.17	Colgate P. O. Peet Co.
117.12	E. C. De Witt Co.
55.45	American Ferment Co.
144.21	Abbott Laboratory
19.60	Chap Stick Co.
29.15	Eversharp, Inc.
158.07	Gibson Greeting Cards
16.66	Penslar Co., Inc.
131.01	W. A. Shaeffer Pen Co.
212.95	E. R. Squibb & Sons

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

91.80	J. B. Williams Co.
101.05	Whitehall Pharmacal Co.
318.63	Yardley of London
89.96	R. L. Watkins
385.61	Associated Sales Co.
79.80	Bourjois, Inc.
153.49	The Bayer Co.
109.00	Becton Dickinson Co.
19.33	Eastmand Kodak Co.
210.14	Roco Creations
335.49	Thalson Co.
175.69	The Upjohn Co.
13.00	Diversey Machine Works
162.70	Lentheric, Inc.
154.97	Northam Warren Corp.
14.11	Ogilvie Sisters
25.39	Pictorial Paper Co.
44.00	Pacquin, Inc.
244.32	Revlon Corp. of Calif.
54.88	W. O. Washburn & Sons
61.42	Prophylastics
16.50	American Optical Co.
250.49	Tek-Hughes, Inc.
86.24	Stephen F. Whitman & Son
135.77	Wyeth, Inc.
51.31	Vick Chemical Co.
500.00	Ansco
18.74	Brown & Haley Tobacco Co.
109.68	Colgate P. O. Peet Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

11.24	Colonial Dames
104.63	Centaur-Caldwell
52.92	Dodge, Inc.
23.67	Ogilvie Sisters
43.12	Pictorial Paper Package
40.82	Pharma. Craft Corp.
27.88	S. & K. Sales Co.
93.98	Shulton, Inc.
209.38	The Upjohn Co.
76.81	William R. Warner & Co.
133.37	Yardley of London
1,042.08	Revlon Corp. of Calif.
141.59	Diversey Machine Works
96.70	John Rustigan
33.24	Evyan, Ltd.
29.60	Jergens Co.
36.00	R. B. Semler, Inc.
62.41	J. B. Williams & Co.
112.81	Lentheric, Inc.
206.88	Tampax, Inc.
84.10	Thalson Co.
220.55	Colgate P. O. Peet Co.
231.08	Dana Perfumes
183.60	Delegar Products, Inc.
111.60	The De Vilbiss Co.
130.76	The Pepsodent Co.
112.20	Chas. H. Phillips Co.
63.75	Procter & Gamble Co.
332.16	Revlon Corp. of Calif.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

198.00	Fridout Sales Co.
269.71	Shulton, Inc.
50.00	H. Dreyfuss & Co.
55.80	L. E. Waterman Co.
390.05	Prophylactic Brush Co.
156.46	Owens Brush Co.
50.00	Premier Sales Co.
7.84	American Phar. Co.
40.40	Aviatrix Company
33.52	Colonial Dames, Inc.
36.00	Chamberlain Sales Corp.
108.25	House of Eee's
135.63	Tek-Hughes, Inc.
29.62	H. Q. Z. Dist. Co.
14.12	Mademoiselle
64.87	Fred D. McKelvy
18.52	S. E. Messengill Co.
48.96	Murine Co., Inc.
213.70	Newell of Calif.
36.00	Noxema Chemical Co.
.80	Pharma. Co., Inc.
56.81	Roger & Gallet
2.45	Schieffelin & Co.
95.55	Stephen Ripley Co.
24.00	Sanitube Co.
2.52	Jean Vivandon Co., Inc.
283.55	Whitehall Pharm. Co.
1.03	Wilson Laboratories
62.07	Yardley of London

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

94.19	John Hudson Moore, Inc.
200.68	W. A. Schaeffer Pen Co.
147.00	White & Wyckoff Mfg. Co.
50.32	Kurlash, Inc.
33.32	Geo. W. Luft Co.
50.40	Dodge, Inc.
3.58	A. Sessenbrenner Sons
114.87	F. W. Fitch Co.
177.85	The Upjohn Company
131.87	Courtley, Ltd.
67.95	Cummer Company
100.60	Bourgeois Sales Corp.
21.17	Kathyrn, Inc.
178.04	Enger Kress Co.
40.98	Zonite Products Corp.
173.69	The Bayer Co.
389.17	Eastman Kodak Co.
64.67	Barbara Gould, Inc.
61.11	L. E. Waterman Co.
50.00	Rolane Sales Corp.
154.80	S. & K. Sales Co.
104.42	Harriet Hubbard Ayer
77.94	Diversey Machine Works
38.81	The DeVilviss Co.
59.98	Everdry Corp.
53.95	Northwestern Plastics
277.21	Yardley of London
89.64	Pharma Craft Corp.
356.06	Colgate P.O. Peet Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

20.00	Iodent Chemical Co.
15.64	Pepsodent Co.
76.79	Lightfoot Schultz Co.
320.78	R. Mohr & Sons
48.47	Murine Co., Inc.
34.80	Charles E. Hires Co.
6.60	Imperial Candy Co.
63.78	D'Orsay Sales Co.
40.57	Colonial Dames, Inc.
130.04	Northam Warren Corp.
18.66	Paschall Laboratory
41.04	Mark Allen Co.
197.03	American Safety Razor Co.
230.99	The Upjohn Company
109.80	Pepsodent Co.
41.87	Roy Daumit Division
8.91	Alfred D. McKelvy Co.
194.73	Evyann Ltd.
44.10	Lady Esther, Ltd.
70.05	Brown & Haley Tobacco Co.
238.97	Mido Hosiery, Inc.
31.36	Requa Mfg. Co.
42.00	The Borden Co.
108.35	Shulton, Inc.
116.80	Whitehall Pharm. Co.
145.62	E. E. Fairchild Corp.
13.57	A. Sensenbrenner & Sons
4.72	Dana Perfumes, Inc.
113.25	Lucian LeLong Perfumes
336.30	Norwich Pharm Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

37.44	Colgate P.O. Peet Co.
601.70	Revlon Corp. of Calif.
64.80	S. & K. Sales Co.
358.71	Abbott Laboratories
341.33	B. B. Pen Co., Inc.
47.63	Consolidated Cosmetics
42.34	Colonial Dames, Inc.
72.24	Barbara Gould, Inc.
1.47	Elgin American
2.98	F. W. Fitch Co.
65.47	Houbigant Sales Corp.
26.95	John Hudson Moore, Inc.
53.31	Geo. W. Luft Co., Inc.
168.67	Lentheric, Inc.
26.05	S. E. Massengill Co.
21.17	Mademoiselle
20.36	Ogilvie Sisters
117.36	The Pepsodent Co.
231.04	Roco Creations
65.80	Roger & Gallet
59.62	Standard Laboratories, Inc.
204.73	J. Tho. Erlin Co.
329.20	W. A. Shaeffer Pen Co.
21.38	Sanford S. Wendel Co.
67.65	R. B. Semler Co., Inc.
106.43	Tampax, Inc.
199.40	The Upjohn Co.
50.33	J. B. Williams Co.
210.49	Wyeth, Inc.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

47.02	Yardley of London
1.39	Cummer Co.
2.98	F. W. Fitch Co.
1.77	Pauma Packaging Co.
3.19	Centaur Company
.90	Lady Esther
6.97	Roger & Gallet
1.83	Pharma Craft Corp.
3.39	Serutan
330.49	Hudnut Sales Co.
253.08	Winthrop Stearns, Inc.
76.33	Proctor & Gamble Co.
144.83	Barbara Gould, Inc.
80.57	Andrew Jergens Co.
39.66	Caron Corp.
252.99	Anseo
5.31	L. E. Waterman Co.
468.71	Caron Corp.
.97	Consolidated Cosmetics
250.00	Tek-Hughes, Inc.
669.74	Eastman Kodak Company
2.17	Tampax, Inc.
121.58	Vick Chemical Co.
92.80	Hires
4.74	Caron Corp.
102.51	R. Mohr & Sons
58.45	Sunset McKee Co.
27.21	F. W. Fitch Co.
67.85	American Stationery Prod. Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

145.54	Theo Erlin Co.
88.20	S. & K. Sales Co.
108.00	Kersten Pipe Co.
133.96	Eiselle & Company
63.77	Cummer Co.
231.81	Hudnut Sales Co.
60.96	Abbott Laboratories
56.67	Lentheric, Inc.
254.70	Colgate P. O. Peet Co.
38.10	C. A. King Co.
312.60	Parfums Eryan Dist.
96.00	Takara Lab., Inc.
294.59	Revlon Corp. of Calif.
45.36	Owens Brush Co.
24.13	Lanteenn Med. Lab., Inc.
26.13	Bell Chemical Co.
42.07	Northam Warren Corp.
53.85	Shulton, Inc.
108.20	Norwish Pharmacal Co.
127.01	S. & K. Sales Co.
270.51	S. Whitman & Sons
31.80	Ogilvie Sisters
103.78	Roco Creations
18.00	Anatole Robbins
41.16	Plate', Inc.
28.33	Mauvel Ltd.
121.30	Dodge, Inc.
233.30	Phopylactic Brush Co.
13.00	R. B. Semler, Inc.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

63.23	Lucien LeLong
177.19	Revlon Corp. of Calif.
42.00	The Kurlash Co.
73.58	Northam Warren Corp.
72.31	Harriet Hubbard Ayer
197.70	Elmo Sales Corp.
873.13	E. R. Squibbs & Son
63.44	American Ferment Co.
113.73	Red Cutlery Corp.
56.16	E. C. DeWitt Co.
123.82	The DeVilbiss Co.
88.96	Chas. H. Phillips Co.
34.56	Natone Co., Inc.
184.88	Whitehall Pharmacal Co.
169.29	Wyeth, Inc.
45.60	Howe Company
3.04	Sanford S. Wendel Co.
18.18	Winthrop Stearns Co.
1.56	R. L. Watkins Co.
34.88	Reliance Molded Plastics
16.69	Mill Factors Corp.
4.50	Roux Distributing Co.
37.23	Jean Jordeau, Inc.
13.31	Imperial Candy Co.
20.00	Iodent Chemical Co.
70.12	Tampax, Inc.
438.44	E. R. Squibbs & Sons
8.15	W. A. Shaeffer Pen Co.
71.65	Thalson & Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

43.20	Plate', Inc.
146.20	Solon Palmer
120.84	The Pepsodent Co.
96.76	Lentheric, Inc.
262.44	Max Landau & Co.
37.13	Barbara Gould, Inc.
118.21	Eastman Kodak Company
164.24	Becton Dickinson Co.
302.11	Anseo
207.73	Abbott Laboratories
236.54	Mido Hosiery
8.30	B. B. Pen Co.
31.14	Caro Corporation
12.28	The DeVilbiss Co.
1.06	Chas. E. Hires Co.
29.31	Lucien LeLong, Inc.
27.64	Noxema Chemical Co.
12.32	Curfet Sales Corp.
.72	Rex Cutlery Corp.
10.00	The Thalson Co.
139.34	S. & K. Sales Co.
159.90	Revlon Corp. of Calif.
237.08	Gibson Art. Co.
3.75	The F. W. Fitch Co.
40.00	Marlin Firearms Co.
2.39	Mido Hosiery Mills
17.77	The Semlar Co.
2.46	The Pepsodent Co.
19.60	Chap Stick Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

12.70	Ambernuts Co.
9.60	Fred W. Aust Co.
11.85	Becton Dickinson & Co.
293.41	Dolcin Corp.
15.88	The DeVilbiss Co.
16.00	Noxema Chemical Co.
197.23	The Schall Mfg. Co.
84.67	The Toni Company
64.29	B. B. Pen Co.
42.34	Amour Toiletries
44.61	The Sofskin Co.
45.08	Continental Pharm. Co.
75.71	The Centaur Caldwell Div.
16.64	Lionel Plastics Corp.
34.16	Lesco Sales Corp.
2.11	Kirsten Pipe Co.
239.42	Wyeth, Inc.
9.35	Allergy & Medical Prods.
24.53	Copeland Candies
13.67	Kelling Nut Co.
244.32	Revlon Corp. of Calif.
42.39	Evans Pen Corp.
77.76	Delegar Products
83.75	Geo. Fick Cigar Co.
223.97	Prophylactic Brush Co.
228.62	Revlon Corp. of Calif.
17.47	The DeVilbiss Co.
197.23	Norwich Pharmacal
157.44	Zerbst Pharmacal Co.

(Testimony of Chris Haleston.)

Petitioner's Exhibit No. 1—(Continued)

69.22	Winthrop Stearns
70.69	Lightfoot Schultz Co.
40.12	Proctor & Gamble
127.00	S. & K. Sales Co.
156.47	Revlon Corp. of Calif.
1.85	The DeVilbiss Co.
20.85	Liberty Orchards Co.
432.00	Peck Corporation
196.77	Whitehall Pharmacal
15.72	Imperial Candy Co.
106.33	R. B. Semler Co.

Total Purchases\$189,157.39

Purchases Out of State..... 57,026.03

Percentage 30.15%

Admitted Jan. 10, 1949.

Mr. Galton: With reference to the admission of this Petitioner's Exhibit Number 1, there are certain questions that I would *like ask* Mr. Haleston, but before doing so, to facilitate the hearing, I will return it to Mr. Masters and withhold my objection until the admission of this in evidence, and until I have had an opportunity to examine him.

Mr. Masters: I want to get it in so I can use it to refer to. That is all. You can make your objections and move to strike it out.

(Testimony of Chris Haleston.)

Hearing Officer Nygren: Do you wish——

Mr. Galton: I would like to reserve my objection.

Hearing Officer Nygren: Suppose you ask the questions about it right now.

Mr. Masters: The chances are I will ask the questions. I would like to finish with it.

Mr. Galton: Let it go in, with my right to state my——

Hearing Officer Nygren: Petitioner's Exhibit Number 1 is received in the record.

(Document marked Petitioner's Exhibit Number 1 for identification was received in evidence.)

Q. (By Mr. Masters): Mr. Haleston, with reference to Petitioner's Exhibit Number 1, the items set forth in it, were they all purchased outside of the State of Oregon?

A. They were all purchased outside of the State of Oregon.

Q. And they were shipped direct to you?

A. Direct to us, at 1103 Southwest Broadway.

Q. From outside of the State of Oregon?

A. Yes. Or they may have been shipped to one of the other stores. They were all outside of the State.

Q. Have you got a percentage of supplies that were purchased from local wholesalers who purchase them from out-of-State producers?

A. I don't have all the figures. We have esti-

(Testimony of Chris Haleston.)

mated, I have one figure which amounts to approximately \$55,000, that was purchased from the largest wholesaler, McKesson & Robbins, and we estimated that at least 60 per cent of the merchandise purchased from McKesson & Robbins come from out-of-State.

Mr. Galton: I object to that. I think it is beyond——

Hearing Officer Nygren: Objection overruled.

Mr. Galton: Pardon me. Let me, if the Hearing Officer will permit, I would like to state my full objection so the Board will have the advantage of what I am trying to say. I object to it for the reason that I think it is beyond this gentleman's knowledge as to whether the products emanated from. I think the proper testimony would be a man from McKesson & Robbins to state just exactly where these products came from.

Hearing Officer Nygren: Objection overruled.

Q. (By Mr. Masters): How long have you been in the drug business, Mr. Haleston?

A. I have been in the drug business for twenty-seven years—twenty-seven years.

Q. Do you know of your own knowledge that these articles you are talking about that you purchased from McKesson & Robbins are manufactured outside of the State?

A. I know very well from the experience we have had from the merchandise we buy from McKesson & Robbins, I estimate 60 per cent, I know more than that come from out-of-State.

(Testimony of Chris Haleston.)

Q. Do you know approximately the percentage that were purchased from all branches of out-of-State producers?

A. Do you mean out-of-State manufacturers?

Q. Yes.

A. That may have a warehouse in this State?

Q. Yes.

A. That would come to about 10 per cent. It would be such items as Upjohn Company, and Sharpe & Dohme. Those are the two main ones that we buy from, but there are others.

Q. Have you got approximately your total sales for the same period as Petitioner's Exhibit Number 1?

A. The total sales for the same period was \$308,011.21.

Mr. Masters: Do you want this affidavit into the record? He has testified to part of it now. I will put the rest of it in, I guess.

Hearing Officer Nygren: As an exhibit?

Mr. Masters: Yes.

Q. (By Mr. Masters): Your drug store at 1304 Southwest Broadway, when was that opened for business?

A. October the 1st, I believe it was opened—September 29th.

Q. Your purchases for that drug store amounted to how much?

Hearing Officer Nygren: That was 1948?

The Witness: 1948.

(Testimony of Chris Haleston.)

Q. For that period, from September 29, 1948, to December 15, 1948.

A. Purchases approximately 13,374.

Q. How much of those were shipped from out of State, purchased from out-of-State?

A. It would have the same percentage as the other stores, because they average about the same.

Q. 30.15 per cent? A. 30.15 per cent.

Q. How much of those materials were out-of-State origins although purchased within the State?

A. I would say approximately 60 per cent.

Q. What is your total sales for that same period?

A. \$20,061.00.

Q. Those sales were made in the State of Oregon?

A. You mean the sales of the sales of the stores?

Q. Yes. A. Oh, yes.

Q. You have no knowledge of any of your customers who make purchases in your stores, if they were from out-of-State or not?

A. No, I have no knowledge.

Q. But you sold to everybody that came along?

A. That is right.

Mr. Masters: I think that is all.

Cross-Examination

By Mr. Galton:

Q. Mr. Haleston, when was the corporation in this State organized? A. 1929.

Q. And you kept that same name since?

(Testimony of Chris Haleston.)

A. No, the name has been changed.

Q. What did the name used to be?

A. The name used to be St. Francis Drug Company, Inc.

Q. And they had just the one store, the St. Francis Drug?

A. No, they added the Eastman Hotel Drug Store, and later added the Commodore Hotel Drug.

Q. When did you add the Heathman?

A. About 1937.

Q. When did you add the Commodore Store?

A. About 1943.

Q. When was the name changed to Haleston Drug Stores, Inc.?

A. I don't remember exactly but it was some time in 1948.

Q. The first part of 1948? A. Yes.

Q. Now, what other business does the corporation own in addition to these four stores?

A. Right now, no other business.

Q. Did it own something previous to this?

A. It owned the stores of Terminal Drug Store, which is out of business at the time.

Q. Where was the Terminal Drug Store?

A. It was on 6th and Taylor.

Q. Sixth and Taylor? A. Yes.

Hearing Officer Nygren: In Portland?

The Witness: In Portland.

Q. Do you plan to reopen the Terminal Drug Store?

(Testimony of Chris Haleston.)

A. No, it is a different corporation, entirely separate.

Q. Is the Terminal Drug Stores a separate corporation? A. It was a separate corporation.

Q. But the Haleston Drug Stores, Inc. own the stock of the Terminal Drug Stores? A. Yes.

Mr. Masters: Capital stock?

The Witness: Capital stock.

Q. In other words, the Terminal Drug Stores is a wholly owned subsidiary of the Haleston Drug Stores, is that right?

A. They own the stock of the Terminal Drug.

Q. In other words, they control this additional corporation. What other business, if any, does the Haleston Drug Store Company own?

A. That is all now.

Q. That is all. Now, when you were talking——

A. (Interposing): For a short period, of course, we had the Haleston Drug Store, Number 4, which the Owl has bought, that was the one that was transferred to the Oregonian Drug Store.

Q. You talked about these purchases and sales. Were they purchases and sales of the drug business, or purchases and sales of the whole operation?

A. No, we did not include Terminal Drug Store sales, or the Haleston Drug Store sales in this, only in the four stores, that's all we included.

Q. Was the Terminal Drug Store operating then?

A. It was a different corporation, it operated different.

(Testimony of Chris Haleston.)

Q. In other words, the Terminal Drug Company has its own books and—— A. Yes.

Q. ——operates its own—— A. Yes.

Q. And you also excluded from these figures the operation of the Haleston Drug Store Number 4?

A. Yes.

Q. You do a lot of fountain business, do you not?

A. We do a considerable amount, yes.

Q. Have you included in these figures the receipts from the fountain business?

A. Yes, that's the total amount of sales.

Q. That is the total amount of sales?

A. Which not only includes the drug department but includes the fountain as well. Our fountain business perhaps would be, I would say, 20 or 25 per cent.

Q. So roughly, of the purchases, you would figure that 25 per cent of these purchases were attributable to the fountain business, is that correct, and that 25 per cent of the sales?

A. No.

Q. Pardon me.

A. However, we buy things like fountain service out-of-State.

Q. I am talking now as to the fountain business. Of the sales for the period that you stated amounting to roughly \$308,000, what percentage of that is attributable to the fountain business?

Mr. Masters: If the Examiner please, I object to it because I don't think it makes a particle of

(Testimony of Chris Haleston.)

difference, interstate commerce in both departments, the burden is going to be on the interstate commerce.

Mr. Galton: You are excluding fountain employees?

Mr. Masters: Yes, it doesn't make any difference, the burden would still be on interstate commerce, if we are in interstate commerce in any department, it is all one.

Hearing Officer Nygren: The objection is overruled. But make the questions on that question short, because I rather agree with counsel.

Q. (By Mr. Galton): All right. What percentage of the fountain business——

A. I have no figures.

Q. ——of the sales would be——

A. I can get the figures but I have no available figures.

Q. Would you estimate it at this time 10, 15, 25 per cent?

A. I would say the total amount, some stores don't do as much as others, would be in the neighborhood of 20 per cent.

Q. How about of the purchases, the same percentage?

A. The greater part of the purchases of the 20 per cent would be local. The main items purchased are manufactured locally.

Q. What I am trying to point out simply, is it fair to say that 20 per cent of the purchases and

(Testimony of Chris Haleston.)

20 per cent of the sales of the fountain department, that is the percentage that it clears to the total amount of sales and purchases that you totalled?

A. I wouldn't figure the same as it would be in the other.

Q. What would be the difference?

A. The difference would be, in our drug items, you can average about one-third and be almost right. But in the soda fountain department, you can't average the same proportion of profit because your combination and your ice cream will produce more as far as purchases and sales, and the sales would probably be the same, but the purchases would be different.

Q. Of the Haleston Drug Stores, what percentage of the space is occupied by the fountain and what percentage of the space is occupied by the Drug Department?

Mr. Masters: I object to that if the Examiner please, I don't think it makes a particle of difference.

Hearing Officer Nygren: Overruled.

Q. What percentage of the space?

A. I would imagine 15 per cent of the space.

Q. Is occupied by what?

A. By the soda fountain proper.

Q. And you, of course, have no breakdown of the sales that were made by the fountain department and the sales that were made by the drug store?

(Testimony of Chris Haleston.)

A. Yes, we have it, but I don't have it here.

Q. Now, of these purchases that you talked about during this 11½ month period, your total purchases was roughly \$189,000, is that right?

A. That is right.

Q. Now, of this total how much is purchased locally, I mean strictly local, from local producers?

A. Of the \$189,000 figure?

Q. Yes?

A. Average purchases of \$57,000 purchased out of State.

Q. And the rest purchased in the State?

A. Approximately,—no, that's out of state, the others would be in the State.

Q. I see. Now, of this \$57,000 that was purchased outside of the State, do you purchase it direct from the company or do you purchase it from a local salesman?

A. Direct from the company. The salesman, of course, we don't wait for the salesman, the salesman will make the regular calls, but if we are out of these items, you see, most of them are purchased from drugs out of State, we send the order direct and it is shipped to us direct.

Q. And it is shipped to you direct without going to a local warehouse?

A. It is shipped direct to us.

Q. I see. As far as your customers are concerned who purchase from your various and sundry drug

(Testimony of Chris Haleston.)

stores, you haven't the slightest idea where they come from?

A. No. I know there is a lot of them come from out of State, because we happen to have three hotel drug stores, and a lot of them travel.

Q. What percentage? A. I don't know.

Q. Is that right?

A. I don't have the figures?

Q. You don't know?

Mr. Masters: He said he didn't know.

The Witness: I don't have the figures.

Mr. Galton: Now he is saying he doesn't have the figures.

Q. You have no knowledge?

A. I have no knowledge.

Q. The Oregonian Store opened when?

A. September 29th.

Q. 1948, is that correct?

A. That is correct.

Q. And you indicated here that the same percentage of your purchases of \$13,374.00 of that, 30.15 per cent came, as you say, direct from out of State? A. Yes.

Q. Yes. To get this one point straightened out, in your petition you indicate that your business is a drug and fountain lunch business, that is correct, is it? A. Yes.

Q. Now, what percentage of the purchases for each of these businesses that your testimony is 20 per cent of the total purchases is attributable to the fountain lunch business, is that correct?

(Testimony of Chris Haleston.)

A. That is purely an estimate. I would say that is about right.

Q. About right. Now, of your fountain lunch business, the great majority of the products are bought locally, are they not, such as your ice cream?

A. Yes.

Q. And your syrups?

A. No, we buy syrups out of State, fountain syrups, we buy quite a few out of State.

Q. But the great majority is ice cream?

Mr. Masters: I still have an objection to all that line of questioning?

Hearing Officer Nygren: Yes, a continuing objection is granted.

Q. (By Mr. Galton): The bread you buy is bought locally? A. Yes.

Q. Who do you buy it from?

A. Wonder Bakery.

Q. Wonder Bakery, and that is a local bakery?

A. Yes.

Mr. Galton: I think that will be all.

Hearing Officer Nygren: I have just one question. It appears that you sell drugs and cosmetics, operate a fountain, also fill prescriptions at your drug stores?

The Witness: Yes, that is primarily our business.

* * *

United States of America
Before the National Labor Relations Board

Case No. 36-RM-26

In the Matter of

HALESTON DRUG STORES, INC.,¹

Employer and Petitioner,

and

RETAIL CLERKS' INTERNATIONAL ASSO-
CIATION, FOOD AND DRUG CLERKS,
LOCAL No. 1092, A.F.L.²

DECISION AND ORDER

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. At the hearing the Retail Clerks' International Association, Food and Drug Clerks, Local No. 1092, AFL, hereinafter referred to as the Union, moved to dismiss the petition on the ground that, inter alia, the Employer's business did not affect interstate commerce. For reasons hereinafter discussed, the motion is granted.

¹The name of the Employer as it appears in the formal papers was amended at the hearing.

²The name of the Retail Clerks' International Association, Food and Drug Clerks Local No. 1092, AFL, as it appears in the formal papers was amended at the hearing.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

The Business of the Employer

The Employer-Petitioner, an Oregon corporation, operates four retail drug stores in Portland, Oregon, at each of which it sells conventional lines of drugs and cosmetics, operates a soda fountain, and prepares and sells medical prescriptions. During the period from January 1, 1948, to December 15, 1948, the Employer made purchases for resale totaling \$189,157.39 of which approximately 30.15 per cent was shipped to the Employer directly from points outside the State of Oregon. Approximately 60 to 75 per cent of the purchases made within the State was of goods originating outside the State, having been purchased from warehouses engaged in interstate commerce including McKesson & Robbins, Upjohn Company, and Sharpe & Dohme. Sales during the same period totaled \$308,011.21, all being made locally at the Employer's drug stores.

The Employer asserts that it is engaged in commerce within the meaning of the National Labor Relations Act. The Union, on the other hand, contends that the operation of the Employer is not one which affects interstate commerce, and that, even if it does affect interstate commerce, then it would not effectuate the policies of the Act to exercise jurisdiction. Without deciding whether or not the Employer's operation affects commerce

within the meaning of the Act, we do not believe that it would effectuate the policies of the Act to assert jurisdiction inasmuch as the Employer's business is essentially local in character. Accordingly we shall dismiss the petition.

Order

It Is Hereby Ordered that the petition for investigation and certification of representatives of employees of Haleston Drug Stores, Inc., Portland, Oregon, filed herein by Haleston Drug Stores, Inc., be, and it hereby is, dismissed.

Signed at Washington, D. C., this 15th day of April, 1949.

PAUL M. HERZOG,
Chairman,

JOHN M. HOUSTON,
Member,

JAMES J. REYNOLDS, JR.,
Member,

ABE MURDOCK,
Member,

J. COPELAND GRAY,
Member,

[Seal]

National Labor Relations Board.

[Endorsed]: No. 12412. United States Court of Appeals for the Ninth Circuit. Haleston Drug Stores, Inc., Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review of Order of the National Labor Relations Board.

Filed January 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12412

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF THE DECISION
AND ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

Comes now the Haleston Drug Stores, Inc., and pursuant to the provisions of Section 10 (f) of the Labor Management Relations Act, 1947, petitions the Court to review and set aside the decision and order of the National Labor Relations Board made and entered on the 31st day of October, 1949, wherein the National Labor Relations Board summarily dismissed the Complaint against Waitresses and Cafeteria Women's Local No. 305, Waiters Local No. 189, Bartenders, Card & Poolroom Workers Local No. 496, Cooks & Assistants Local No. 207, Hotel Service Employees Local No. 664, and Local Joint Executive Board of H. & R.E.I.A. and B.I.L. of A., commonly known as Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL, issued by the General Counsel of the National Labor

Relations Board charging them with an unfair labor practice against Petitioner.

Petitioner claims that it is engaged in an operation in commerce or effecting commerce within the meaning of the Labor Management Relations Act, 1947, and, therefore, the National Labor Relations Board must take jurisdiction of the said Complaint and does not have any authority to refuse to exercise such jurisdiction.

Dated at Portland, Oregon, this 28th day of November, 1949.

HALESTON DRUG STORES,
INC.,

By /s/ C. D. HALESTON,
President.

MASTERS & MASTERS,
By /s/ WILL H. MASTERS,
of Attorneys for Petitioner.

Affidavit of Mailing attached.

[Endorsed]: Filed November 29, 1949.

[Title of Court of Appeals and Cause.]

ANSWER OF NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REVIEW OF ITS ORDER AND DECISION

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the Na-

tional Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. II, Sec. 151, et seq.), herein called the Act, files this answer to the petition for review of its order and decision, issued in the proceeding designated on the records of the Board as Case No. 36-CB-7, entitled: In the Matter of Waitresses and Cafeteria Women's Local No. 305, Waiters Local No. 189, Bartenders, Card & Poolroom Workers Local No. 496, Cooks & Assistants Local No. 207, Hotel Service Employees Local No. 664, and Local Joint Executive Board of H. & R.E.I.A. and B.I.L. of A., commonly known as Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders International Union, A.F.L. and Haleston Drug Stores, Inc.

1. The Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

2. The Board denies each and every allegation of error contained in the Petition for Review.

3. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act.

Wherefore, the Board respectfully requests this Court to deny the Petitioner's prayer for relief.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ IDA KLAUS,
Solicitor.

Dated at Washington, D. C. this 13th day of January, 1950.

District of Columbia—ss.

Ida Klaus, being first duly sworn, states that she is Solicitor of the National Labor Relations Board, Respondent herein, and that she is authorized to and does make this verification in behalf of said Board; that she has read the foregoing answer and has knowledge of the contents thereof; and that the statements made therein are true to the best of her knowledge, information and belief.

/s/ IDA KLAUS,
Solicitor.

Subscribed and sworn to before me this 13th day of January, 1950.

[Seal] /s/ ROSEMARY FILIPOWICZ,
Notary Public,
District of Columbia.

My Commission expires March 15, 1953.

[Endorsed]: Filed January 16, 1950.

[Title of Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS

The Petitioner will rely upon the following points in the above entitled matter:

1. The National Labor Relations Board was under a duty to determine from the evidence whether Petitioner's operations were in commerce or effecting commerce within the meaning of the Labor Management Relations Act, 1947.

2. The summary dismissal of the proceedings without hearing the evidence was in error.

3. If Petitioner's operations were, in fact, in commerce or effecting commerce within the meaning of the Labor Management Relations Act, 1947, the National Labor Relations Board was compelled to take jurisdiction and had no right to dismiss the complaint for reasons of policy.

4. The decision of the National Labor Relations Board in Case 36-RM-26 is not binding upon the Petitioner in this case because there are different parties and the subject matter is different.

Respectfully submitted,

/s/ WILL H. MASTERS,

of Attorneys for Petitioner.

State of Oregon,
County of Multnomah—ss.

Due and legal service of the within Petitioner's Statement of Points by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 23rd day of January, 1950.

/s/ B. A. GREEN,
Attorney for Unions.

Affidavit of Mailing attached.

[Endorsed]: Filed January 24, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Petitioner hereby designates the record which is material consideration of the review as follows, to-wit:

- (1) Amended charge by Petitioner of March 15, 1949.
- (2) Complaint issued by the National Labor Relations Board in case 36-CB-7, August 2, 1949.
- (3) Unions' motion for an order dismissing its complaint, August 3, 1949.
- (4) Unions' answer to complaint, August 11, 1949.

(5) Order designating Charles W. Whittemore as Trial Examiner, August 11, 1949.

(6) Order referring Unions' motion to dismiss to the Division of Trial Examiners for action, issued August 10, 1949.

(7) Order granting unions' motion by Trial Examiner, August 11, 1949.

(8) Petitioner's motion to reconsider order of Trial Examiner together with affidavit attached.

(9) That part of General Counsel's request for review dated August 23, 1949, down through the words "exist in fact" on Line 11, Page 2.

(10) The Board's decision and order on October 31, 1949.

(11) That part of the transcript of testimony in case 36-RM-26, beginning with direct examination Chris Haleston on Page 7, down through Line 21, Page 22, together with Petitioner's Exhibit 1.

(12) Decision and order of the Board in case 36-RM-26, April 15, 1949.

Respectfully submitted,

/s/ WILL H. MASTERS,

of Attorneys for Petitioner.

State of Oregon,
County of Multnomah—ss.

Due and legal service of the within Designation of Record by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 23rd day of January, 1950.

/s/ B. A. GREEN,
Attorney for Unions.

Affidavit of Mailing attached.

[Endorsed]: Filed January 24, 1950.

In the United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF

FILED

MAR 30 1950

MASTERS & MASTERS,
703 Yeon Bldg., Portland, Oregon,
Attorneys for Petitioner.

PAUL P. O'BRIEN,

IDA KLAUS, Solicitor,
Washington, D. C.,
of Attorneys for Respondent.

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In the United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF

STATEMENT OF FACTS

The Petitioner filed with the National Labor Relations Board at Portland, Oregon, an amended charge against the Unions known as the Culinary Workers Alliance, each affiliated with Hotel & Restaurant Employees and Bartenders International Union, A.F.L., of an unfair labor practice (Printed Record, pages 2, 3 and 4).

After investigating the charge, the General Counsel for the National Labor Relations Board filed a com-

plaint against the Unions alleging facts constituting an unfair labor practice by the Unions and alleging facts showing the operation of the Petitioner to be in interstate commerce or affecting commerce (Printed Record, pages 5 through 11). This charge was based on Section 8 (b) (1) and (2) and (4) (A) and (B) of the National Labor Relations Act as amended in 1947.

Previously, the Petitioner had filed a Petition with the Board against another Union asking the Board to hold an election. A hearing was held by the Board on this petition to determine whether the Petitioner was operating in interstate commerce or affecting commerce. After the hearing, the Board held that even though the Petitioner's operations were in commerce or affecting commerce, it did not effectuate the policies of the Act to take jurisdiction and dismissed the petition (Printed Record, pages 67, 68 and 69). Under the National Labor Relations Act as amended in 1947, the Petitioner had no right of review or appeal in a representation case.

August 16, 1949 was set as the date for the hearing of the complaint on the unfair labor charge. On August 5, 1949, a motion was filed by the Unions with the Board urging a summary dismissal of the complaint for the reasons that the employer involved is not engaged in an operation in commerce or affecting commerce and that even if it does affect commerce, it would not effectuate the policies of the Act to exercise jurisdiction (Printed Record, pages 11 and 12). On August 10, 1949, this motion was referred to the Trial Examiner for disposition (Printed Record, page 15). On August 11,

1949, the Trial Examiner issued an order granting the motion to dismiss the complaint on the ground that "whether or not the employer's operation affects commerce within the meaning of the National Labor Relations Act . . . , it would not effectuate the policies of the Act to exercise jurisdiction." (Printed Record, pages 16 and 17). The holding of the Hearing Officer was brought before the Board both by the employer and the General Counsel of the Board and the Board sustained the holding of the Hearing Officer (Printed Record, pages 17 through 23). The employer has now petitioned this Court to review this decision.

The Court acquired jurisdiction of this matter by reason of Section 10(f) of the National Labor Relations Act as amended in 1947 which provides:

"any person aggrieved by a final order of the Board granting or denying, in whole or in part, the relief sought, may obtain a review of such order in any Circuit Court of Appeals in the United States in the circuit wherein the unfair labor practice was alleged to have been engaged in or wherein such person resides or transacts business. . . ."

That the Petitioner resides in and transacts business in the State of Oregon and the unfair labor practice charged was engaged in in the State of Oregon.

ASSIGNMENT OF ERROR

I.

The Board erred in not holding a hearing to determine whether the Petitioner's operations were in commerce or affecting commerce.

POINTS AND AUTHORITIES

I.

Petitioner's operations were in commerce and affected commerce.

N.L.R.B. v. Fainblatt, 306 U.S. 601, 604, 607.

N.L.R.B. v. Bradford Dyeing Ass'n., 301 U.S. 318, 326.

N.L.R.B. v. Cowell Portland Cement Company, 108 F. (2d) 198 (C.A. 9).

N.L.R.B. v. Register Publishing Company, 141 F. (2d) 156 (C.A. 9).

N.L.R.B. v. Va. Elec. and Power Co., 115 F. (2d) 414, 416 (C.A. 4), aff'd. 314 U.S. 469.

Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 464.

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Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 222.

N.L.R.B. v. Suburban Lumber Co., 121 F. (2d) 829 (C.A. 3).

ARGUMENT

I.

The Petitioner is engaged in operating four retail drug stores. Annually, the employer makes purchases of drugs and medicines for resale totaling approximately \$190,000.00 of which approximately 30% (about \$57,000) is shipped to the employer from shippers outside the State of Oregon. The remainder, approximately 60% to 75% (\$79,000 to \$100,000) are purchases made

within the State of Oregon of goods that originated outside of said State. Annually, the Petitioner sells merchandise and drugs totalling in value approximately \$325,000.00, all of which sales are made locally at the employer's drug stores (Printed Record, pages 19, 20, 21, 35 to 66 inclusive).

In view of the holding of the Courts, it does not seem necessary to make any extended argument to demonstrate that a business enterprise which annually purchases for resale, goods valued at about \$150,000 which originate outside the State, is engaged in an operation in commerce and affecting commerce, and particularly where more than \$50,000 worth of these goods are shipped directly to the Petitioner from points outside the State.

In addition to the employer's business activities described above, the employer operated a fifth store from January, 1948 to September 1, 1948, and through a wholly-owned subsidiary corporation, operated a sixth store known as the Terminal Drug Store (Printed Record, page 19). The dollar volume of gross sales and gross purchases of these two stores are not reflected in the figures set forth in the complaint. When these figures are included, the employer's gross sales amount to about half a million dollars (\$478,108.63) and the cost of the goods sold amounted to \$323,938.54. Approximately 70% (about \$226,756) of the goods so purchased are trade-name products that are manufactured in states other than Oregon. The employer receives these products through four channels:

1. About 30% (about \$68,027) by direct shipment on orders placed directly with firms outside the State.

2. A relatively small additional quantity by direct shipment from firms outside the State on orders placed with local jobbers.

3. A substantial amount delivered from local warehouses of out-of-State firms having division offices in Oregon; these shipments are in effect, direct deliveries from firms outside the State.

4. The remainder by delivery from local warehouses on orders placed with local jobbers, being products of out-of-State manufacturers shipped to jobbers for resale in Oregon (Printed Record, pages 19 and 20).

Many of the brand-named products are sold to the employer by warehouses engaged in interstate commerce including McKesson & Robbins, Upjohn Company and Sharpe & Dohme, and are often sold under dealership agreements. Much of the advertising used by the employer in window and counter displays is supplied by the manufacturers and ties in with their national advertising and sales promotion program (Printed Record, pages 19, 20 and 21).

All of these facts the Petitioner and the General Counsel stood ready to prove if a hearing had been held; and in view of these facts, it seems needless to make any argument as to whether the Petitioner was engaged in commerce or affecting commerce. The cases cited and a host of other cases definitely hold that such an operation is in commerce or affecting commerce.

POINTS AND AUTHORITIES

II.

If Petitioner's operations are in commerce or affecting commerce, the Board is compelled to take jurisdiction under the Labor Management Relations Act, 1947.

Section 1(b) of the Act.

Section 101, Section 1 of the Act.

Section 101, Section 2, Subd. 6 and 7 of the Act.

Section 101, Section 10(a) of the Act.

N.L.R.B. v. Cowell Portland Cement Company,
108 F. (2d) 198 (C.A. 9).

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Inloes & Dugan Motors, and International Association of Machinists (Ind.), Case #36-B-291.

(The last two cases not being reported.)

ARGUMENT

II.

The Labor Management Relations Act of 1947 has a very broad coverage as to interstate commerce and

affecting commerce. It would seem that the intention of Congress was to protect interstate commerce from being disrupted by strikes and labor disputes. The avowed purpose of the Act is set forth in Section 1 (b) under the heading "Short Title and Declaration of Policy" wherein it is stated:

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

Under Section 101, Section 1, under the heading "Findings and Policies," Congress again reiterates its policy. This Section provides:

" . . . which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of

the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market of goods flowing from or into the channels of commerce.

“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining.”

Then again in Section 2, (6) and (7), Congress defines very specifically the terms “commerce” and “affecting commerce”. It would, therefore, seem that the main policy of the Act as set forth by Congress was the attempt to prevent the interruption of commerce or the flow of commerce by unfair labor practices or other practices, and from that it would seem very clear that Congress contemplated that if an operation was in commerce or affecting commerce, that the Board had jurisdiction and there is nothing in the Act whereby the Board can refuse to take jurisdiction.

In *N.L.R.B. v. Fainblatt*, 306 U.S. 601, the Court stated:

“The end sought by the enactment of the statute was the prevention of the disturbance to interstate commerce consequent upon strikes and labor disputes induced or likely to be induced because of unfair labor practices named in the Act.”

In the case of *N.L.R.B. v. Cowell Portland Cement Company*, Supra, this Court has practically decided this question. The question in that case was whether a small amount of interstate commerce business prevented the operation from coming under the Act as against a larger amount in which a small amount was not under the rule of deminis. This Court held that the N.L.R.B. act

“on its face . . . evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of specified acts . . . Examining the act in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the act depend upon any particular volume of commerce effected more than that to which the Courts would apply the maximum deminis . . . Otherwise, we would have the anomoly of one plant under federal regulation—while alongside it, another competing plant under state regulation. . . .

“Congress could not have intended that it subject laboring men or employers to such a confusing and, in business competition, such a destruction anomoly. . . . Though respondent’s manufacturing activities separately considered be deemed intrastate in character, they bear a direct relationship to its interstate activities. Stoppage of respondent’s interstate shipments constituting interruption of or interference with the flow of interstate commerce would directly follow from stoppage by industrial strife of its manufacturing operations.”

We have the same situation before the Court in this case. There is no question of the amount of interstate operation and there is no question that its operation is *in* interstate. We have the anomolous situation by rea-

son of the Board's rulings whereby the Board in the same case, at its own whim, may take jurisdiction or may not take jurisdiction. In other words, the Board has been exercising jurisdiction in cases where the same state of facts exist. In the *Puritan Chevrolet* case cited, the company operated its sales and service in Auburn, Maine, and purchased its cars from outside the state, but sold no cars outside the state. In this case, the Board exercised jurisdiction. In the two cases, *Bob's Auto* and *Inloes & Dugan Motors* cited, which were tried by the writer, both of these firms are automobile dealers in the City of Newberg, Oregon. They purchase most of their cars from outside the State of Oregon and sell no cars or any other commodity outside the State of Oregon. They were just as much local in character as the case before this Court and yet the Board took jurisdiction.

A number of cases are cited in the *Liddon White Truck Company, Inc.* case wherein the Board took jurisdiction where the operations were local in character. The Board is subjecting, as this Court said in the *Cowell Portland Cement Company* case, laboring men and employers to a confusing and destructive anomaly. Congress intended that if the operation was in commerce or affecting commerce, that the Board should take jurisdiction.

In the case before the Court, the Petitioner's operations in the State of Oregon separately considered would be all intrastate in character but they have a direct relationship to its interstate activities. The picketing of the Petitioner and the stopping of it from doing business,

would create a stoppage of its interstate shipments constituting an interruption and interference with the flow of interstate commerce.

While the construction of another act is not controlling on this Court on the construction of the National Labor Relations Act of 1947, we submit that it should be most persuasive. The National Labor Relations Act of 1947 in its coverage as to commerce, is almost exactly the same as the Wage and Hour Act, Title 29 U.S.C.A., Sections 202 and 203. In construing the commerce feature of the Wage and Hour Act, the Courts went a long way in construing that the employer's operations were in commerce. They went so far as to hold that if the operation in any remote way was affecting commerce, the firms were under the Act. Congress in amending the Wage and Hour Act, Title 29, U.S.C.A., Section 213, exempted certain businesses from the coverage of the commerce feature of the Act thereby showing the intention to limit the coverage under the Wage and Hour Act. No such amendment was made to the National Labor Relations Act. Consequently, we submit to the Court that this fact is a powerful indication of the intention of Congress to put all firms under the Act whose operations affected commerce at all.

ASSIGNMENT OF ERROR

II.

The Board erred in holding that even though Petitioner's operations were in commerce or affected com-

merce within the meaning of the Act, it would not effectuate the policies of the Act to exercise jurisdiction.

POINTS AND AUTHORITIES

I.

The National Labor Relations Act of 1947 restricted the powers of the Board and created a new agency; Section 3(d) of the National Labor Relations Act of 1947.

Adelard Lincourt v. N.L.R.B., 170 Fed. (2d) 306.

Jacobsen v. N.L.R.B., 120 Fed. (2d) 96, 100 and 101.

ARGUMENT

In reaching a conclusion on the question as to whether the Board has the right to dismiss an unfair labor practice complaint on the sole ground that it would not effectuate the policies of the Act to exercise jurisdiction, we must first look to the language of the Act as amended in comparison with the original National Labor Relations Act. The Board only gets jurisdiction and powers from the Act itself. Under the original Act, the Board was both prosecutor and judge in unfair labor practice cases. The decision as to which unfair labor practice charges should be prosecuted was made by Regional Directors who were directly subordinate to the Board. When an unfair labor practice complaint was issued by the Board, the Board prosecuted the same and ultimately made the findings of fact and conclusions of law with respect to the existence of the unfair practice charged.

It was this provision of the original Act whereby the Board acted both as prosecutor and judge, that brought forth more condemnation and criticism perhaps than any other provision of the original Act. It would not be out of line to suggest that this was one of the reasons for the amendment of the original Act. It seems quite apparent when you turn to the provisions of the National Labor Relations Act as amended that Congress intended and attempted to separate these functions of the Board and place the investigation and prosecution of unfair labor charges in the hands of the General Counsel.

A new Section was added to the Act being Section 3(d) which provides:

“ . . . he shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board. . . .”

In the case of *Adelard Lincourt v. N.L.R.B.* cited Supra, the Court noted that the Act as amended introduced in Section 3 of the National Labor Relations Act, a new subsection (d) which took away from the Board the administrative power to issue complaints under Section 10, and held that the administrative determination of the General Counsel was not reviewable. This statutory grant of “final authority” to the General Counsel is not compatible with the idea that the Board has the discretion to assert or reject jurisdiction on the grounds of policy. “Final authority” implies an authority which is not subject to review of any kind. It would completely nullify the demonstrated legislative intent that

the Board should have the right of review over the General Counsel.

Under this new Section, Sub-section 3(d), it is the duty of the General Counsel to issue complaints in unfair labor practice charges. Under this Section, the General Counsel after investigation, filed a complaint in this case alleging jurisdictional facts under commerce or affecting commerce and also facts supporting the unfair labor practice charged and his decision as to whether complaints should be filed or not was final and could not be reviewed by the Board. By his filing of the complaint, the Board acquired jurisdiction and it was incumbent upon them to hear the testimony and decide whether the Petitioner's operations were in commerce or affecting commerce. The Board dismissed the complaint summarily without any hearing (Printed Record, pages 23 to 33 inclusive), and the Petitioner and the General Counsel were at all times ready to substantiate the allegations of the complaint as to commerce.

Under what theory does the Board shed jurisdiction? Even before the Amendment of the National Labor Relations Act in 1947, the Court held in the case of *Jacobson v. N.L.R.B.*, Supra, that the Board having issued a complaint, has the affirmative duty to conduct a hearing and determine whether jurisdiction exists, and if it does exist, to determine the case on its merits and to issue an appropriate order in respect thereto. This holding was made when the Board issued its own complaint and was in a case where the Board had issued a complaint and then attempted to deny jurisdiction.

The same ruling would most certainly be true in the case before the Court. The General Counsel issued a complaint and he had the final authority as to its issuance and, having issued said complaint, it was incumbent upon the Board to determine from the evidence whether the employer's operations were in commerce and the Board had no authority to summarily dismiss the complaint without a hearing.

POINTS AND AUTHORITIES

II.

The legislative history of the Labor Management Relations Act, 1947, shows that the Board does not have the right to refuse jurisdiction because it does not effectuate the policies of the Act.

House Bill H.R. 3020.

House Report No. 245, 80th Congress, 1st Session,
at Page 6.

House Report No. 245, 80th Congress, 1st Session,
at Page 74.

Senate Report 105, on S. 1126, 80th Congress, 1st
Session, at Page 9.

93 Daily Congressional Record 6599, June 5,
1947.

93 Daily Congressional Record 6600, June 5,
1947.

93 Daily Congressional Record 7001, June 12,
1947.

93 Daily Congressional Record 7691, June 23,
1947.

H. Doc. No. 334, 80th Congress, 1st Session. Reprinted in 93 Congressional Record 7502, June 20, 1947.

93 Congressional Record 5145, May 12, 1947.

93 Congressional Record 5146, May 12, 1947.

93 Congressional Record 6655, June 6, 1947.

93 Congressional Record 6661, June 6, 1947.

93 Congressional Record 6672, June 6, 1947.

ARGUMENT

There are two principal sources of information in determining whether the Board has the power to dismiss a complaint issued by the General Counsel on the ground that it does not effectuate the policies of the Act to exercise jurisdiction. First, the statute itself. We have already discussed the provisions of the statute. Second, the record of the debates in Congress. This source is very important in this case as showing that both the proponents and opponents of the provisions of the amended Act, with reference to the changes in the original Act, knew just exactly what was being done and what the result would be.

H.R. 3020 had provided a completely independent agent who was to be known as the "Administrator" of the National Labor Relations Act. The House Bill also abolished the National Labor Relations Board and created a new three-member Board. In the House Report No. 245, 80th Congress, 1st Session, at Page 6, the Committee said:

“Unlike the old Board, it will not act as prosecutor, judge, and jury. *Its sole function will be to decide cases.* A new and independent officer, the Administrator of the new Act, will investigate cases and present evidence to the new Board and the new Board must decide the cases. . . .” (Italics ours)

That the Minority members of the House Committee understood that this was to be a separation of functions is shown by the statement of the Minority Report. House Report No. 245, 80th Congress, 1st Session, at Page 74, states:

“The functions of the Board are to be limited solely to the decision of cases and the Administrator is to assume all of the investigatory and prosecuting functions of the present National Labor Relations Board.”

In reporting out S. 1126, the Senate Committee on Education and Labor indicated that they believed changes in the structures of the Board were necessary. At Page 9, Senate Report 105 on S. 1126, 80th Congress, 1st Session, the Committee said:

“Since it is the belief of the committee that *Congress intended the Board to function like a court*, this bill eliminates the Review Section.” (Italics ours)

The Conference Bill accomplished the separation of functions by creating an independent office of General Counsel within the Board structure. Final authority was given to the General Counsel over the issuance of complaints. All of the debates clearly show that it was the intention of the Conference Committee to accomplish the separation of the judicial and prosecuting functions under the Labor Management Relations Act.

Senator Taft filed a summary of the provisions of the Conference Bill in which he stated in 93 Daily Congressional Record 6599, June 5, 1947:

"One of the major problems with which the conferees were faced was the reconciliation of the provisions of the House Bill and the Senate amendments with respect to the reorganization of the National Labor Relations Board. Under the Senate amendment the present Board members were to be retained in office but four additional members were to be added, thus increasing the Board to seven. The House bill abolished the present Board, created a new Board of three members and limited the duties of the members to quasi-judicial functions. The House bill also created a new independent agency under an administrator to be appointed by the President (subject to Senate confirmation) to perform the investigating and prosecuting functions.

"The conference agreement (section 3(a)) retains the existing Board and increases its membership to five rather than seven. *Further, it recognizes the principle of separating judicial and prosecuting functions without going to the extent of establishing a completely independent agency. It accomplishes separation of functions within the framework of the existing agency by establishing a new statutory office, that is, a general counsel of the Board to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. . . . He is also to have the final authority to act in the name of, but independently of any direction, control, or review by the Board in respect to the investigation of charges and the issuance of complaints of unfair labor practices and in the prosecution of such complaints before the Board.*" (Italics ours)

In a final summation, just before the vote on overriding the President's veto of the Conference Bill (93

Daily Congressional Record 7691, June 23, 1947), Senator Taft spoke of the powers of the General Counsel as follows:

"All that we have done with the Board, as referred to by the Senator from Wyoming, is to make a separation of powers. Under this bill the Board is judicial. It is judicial today. Its counsel will be a prosecutor. He will not have any extraordinary powers—nothing like the power of the Attorney General of the United States, who decides whether criminal actions shall be brought against anyone in the United States. Under this bill, the counsel will have the right to make the decision as between employer and employee; but his decision will be subject to the judicial decision of the Board and, above the Board, the courts; . . ."

The President's veto message also shows clearly that he understood what Congress was intending to do. The President's veto message (H. Doc. No. 334, 80th Congress, 1st Session. Reprinted in 93 Congressional Record 7502, June 20, 1947) said:

"It would invite conflict between the National Labor Relations Board and its General Counsel, since the General Counsel would decide, without any right of appeal by employers and employees, whether charges were to be heard by the Board, and whether orders of the Board were to be referred to the Court for enforcement. By virtue of this unlimited authority, a single administrative official might usurp the Board's responsibility for establishing policy under the Act."

The Congressional Record abounds with charges by Senators and Representatives that the proposed bill would make the General Counsel a "czar" or a "dictator". Senator O'Mahoney thought that the bill made

the Counsel "completely independent" and gave him "what amounts to the power of prosecution" (93 Congressional Record 5145, May 12, 1947). Senator Ball, rising in response, did not disagree. He merely expressed the hope that the nation might work, ultimately, toward the complete elimination of the "administrative-law" approach (93 Congressional Record 5146, May 12, 1947).

Senator Murray, another opponent of the bill stated (93 Congressional Record 6655, June 6, 1947):

"The effect of this provision, is to set up a labor czar within the National Labor Relations Board. . . . One person will determine when complaints shall issue in all cases . . . , how cases shall be tried, which cases shall be enforced. . . . No real power is vested in the Board in order that their collective common sense may be brought to bear on these serious problems. The whole purpose of the administrative process, that uniform policies may prevail at all levels of work, is thereby frustrated. . . . Coordination in policy is essential in order that rules and regulations, prosecutions, and decisions maintain some consistency."

In 93 Congressional Record 6661, Senator Murray stated:

"The effect of the proposed change in the status of the Board's General Counsel is to place enormous power in the hands of a single individual, making him virtually a 'labor czar'. This power would include the right to decide what unfair labor practice cases shall come before the Board and the courts for decision. Through this power, the General Counsel, to a considerable degree, would be able to control the policy for the enforcement of the Act."

The question most certainly arises as to whether such language would be used if the power remained in the Board to dismiss any complaint when, in its own opinion, a substantive decision as to the validity of the allegations contained in the complaint would not effectuate the policies of the Act.

A clearer statement on this issue is one of Senator Pepper's opposition to the bill wherein he states:

"The General Counsel is to determine when a complaint shall be acted upon by the Board. In other words, one man is made the arbiter of every case that comes before the attention of the Board. The Board has no authority to decide whether a case should be brought, or whether a complaint should be acted upon. That exclusive power is given to one lawyer, provided for by the bill agreed to in the conference of the House and the Senate."

(93 Congressional Record 6672, June 6, 1947.)

The Court can readily see that there can be no question whatsoever that Congress intended a separation of powers and has taken away much of the administrative powers of the Board. The Board is now quasi-judicial in character and it does not have any right under the provisions of the Act to dismiss the complaint where, in fact, it has jurisdiction merely on policies.

In conclusion, we submit to the Court that Petitioner's operations were in interstate commerce and effecting interstate commerce and the General Counsel, having issued a complaint alleging an unfair labor practice, and facts showing that Petitioner's operations were in commerce or effecting commerce and it, therefore, was the duty

of the National Labor Relations Board to hold a hearing on said complaint and decide the facts therein stated. They clearly erred in dismissing the said complaint summarily without any attempt to hear the evidence and determine from the evidence in a judicial capacity their findings.

Respectfully submitted,

MASTERS & MASTERS,

Attorneys for Petitioner.

In the United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICI CURIAE SUPPORTING
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

MASTERS & MASTERS,
703 Yeon Bldg., Portland, Oregon,
Attorneys for Petitioner.

IDA KLAUS, Solicitor,
Washington, D. C.,
of Attorneys for Respondent.

GREEN, LANDYE & RICHARDSON and BURL L. GREEN,
Corbett Building, Portland, Oregon,

J. W. BROWN,
Fountain Square Building, Cincinnati, Ohio,
Amici Curiae.

FILED

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In the United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION

Comes now Green, Landye and Richardson and Burl L. Green and J. W. Brown and represents to this Honorable Court that they are attorneys for Waitresses and Cafeteria Womens Local No. 305, Waiters Local No. 189, Bartenders, Card and Pool Room Workers Local No. 496, Cooks and Assistants Local No. 207, Hotel Service Employees Local No. 664, Local Joint Executive Board of the Hotel and Restaurant Employees and Bartenders International Union, formerly Hotel and Restaurant Employees International Alliance and Bar-

tenders International League of America, original parties in this proceeding before the National Labor Relations Board and petitions the Court for an order allowing the filing of brief herein amici curiae on the ground and for the reason that they have a direct interest in this litigation and that their interests will be affected by any decision herein.

GREEN, LANDYE AND RICHARDSON and

BURL L. GREEN,

J. W. BROWN,

Attorneys for Culinary Workers Alliance.

In the United States
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HALESTON DRUG STORES, INC.,
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vs.

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Respondent.

BRIEF OF AMICI CURIAE SUPPORTING
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

In view of the fact that the Union known as the Culinary Workers Alliance each affiliated with Hotel and Restaurant Employees and Bartenders International Union, A.F.L. were the parties charged with an unfair labor practice in the original proceedings before the N.L.R.B. they have a direct interest in this litigation. Hence the authors of this brief as representatives of these Unions have felt it desirable and important that we ask leave to appear amici curiae.

STATEMENT OF FACTS

The record as revealed in the printed transcript on file herein and the appellant's statement contained in its brief is full and correct, therefore nothing need be added.

ANSWER TO APPELLANT'S FIRST ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

I.

Petitioner's operations were not in commerce nor did they affect commerce within the meaning of the act.

Consol. Edison Co. v. N.L.R.B., *infra*.

La Crosse Tele. Corp. v. Wisconsin Emp. Rel. Bd., *infra*.

Pittsburg Rys. Co., *infra*.

ARGUMENT

Appellant's brief on its first point is taken up entirely by its attempt to show that because of substantial purchases of out of state goods for the purpose of resale in its retail drug stores it was engaged in interstate commerce and affected commerce. On page 11 of appellant's brief appears the following statement:

"In the case before the Court, the Petitioner's operations in the State of Oregon separately considered

would be all intrastate in character but they have a direct relationship to its interstate activities.”

We see, therefore, at the outset that the appellant admits that it was engaged in essentially a local enterprise. It is next contended that because a substantial percentage of its purchases originate from outside the state that any labor dispute would affect interstate commerce. We cannot deny this statement. It would indirectly affect commerce between the appellant and his out of state wholesale suppliers. In this modern age of rapid transportation and manufacture of goods in large factories situated throughout the U. S. there can be little doubt that no matter how large or small a retailer may be, yet he is engaged to some extent at least in a business affecting interstate commerce. It would be almost impossible to think of a business that does not sell or use some articles produced outside the state.

We admit it is not the amount that is controlling. Even though the interstate operation was small it might greatly affect commerce, whereas, on the other hand the interstate feature might be large and still have only an inconsequential affect on commerce. Herein lies the entire crux of the question.

Each of the cases cited by appellant to sustain its position that its business affected commerce has been closely examined. We do not differ with any of the decisions reached by the courts. In each of the cases cited the appellate courts merely affirmed the doctrine that outside of the de minimus rule, the amount of the interstate business is not important. In each of the cases the Board had assumed jurisdiction and found that the

particular business affected commerce. The appellate court affirmed the Board's ruling in each instance. None of the cases cited lend support to the appellant's position here; that is where the Board finds that the business does not affect commerce that the volume of out of state business controls the Board in its determination.

It is our contention the Congress meant a substantial affect on commerce and not every indirect or remote affect. The decisions of the courts directly support such a contention.

We quote:

"Burdens and obstructions may be due to injurious actions springing from other sources. And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to Federal control is left to be determined as individual cases arrive. *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 222."

The question in each case is whether the affect is close and substantial. It was said in *Scheckter Corp. v. U. S.*, 295 U.S. 495:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

Again it was said in *La Crosse Tele. Corp. v. Wisconsin Emp. Rel. Bd.*, 30 N.W. (2d) 241, 244, 251 Wis. 583, (reversed on other grounds 93 L. Ed. 265):

“Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce.”

Where the employers themselves are not engaged in interstate commerce the question is whether their acts actually affect interstate commerce in any substantial manner and does not relate to the existence of the federal power but to the propriety of its exercise on a given state of facts. See *Pittsburg Rys. Co.*, 54 A. (2d) 891, 357 Pa. 379; *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 223-224.

It is therefore contended that the Board properly affirmed the trial examiner's ruling in allowing the motion of the employees to dismiss the complaint on the ground that the operation did not affect commerce. It is plain to be seen that this was one of the grounds on which the motion was granted (Rec. P. 17). The Board's action in affirming the trial examiner was on the entire record (Rec. P. 33).

The appellant contends next that if its operations were in commerce or affected commerce the Board was compelled to take jurisdiction. Outside of the question of the right of the Board to dismiss a complaint because it would not effectuate the policies of the act to exercise jurisdiction, which will hereafter be considered, we will admit the appellant is correct in this contention. As we have previously pointed out, though, it is not every enterprise which might indirectly affect commerce that compels the Board to assume jurisdiction. The appellant cited no authority under this contention which compels

a finding by the Board that an enterprise affects commerce even though the affect is indirect or inconsequential. This is the important question and must be decided on the particular facts in each instance. It is our contention that the Board in carrying out the purposes of the act is to be given wide latitude in making such a determination.

ANSWER TO APPELLANT'S SECOND ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

II.

The Board does have the power to refuse to exercise jurisdiction for the reason that it would not effectuate the policies of the act.

Section 10 (a) N.L.R. Act, 1947, 29 U.S.C.A.
160 (a).

Section 10 (c) N.L.R. Act, 1947, 29 U.S.C.A.
160 (c).

Section 3 (d) N.L.R. Act, 1947, 29 U.S.C.A.
153 (d).

Colgate-Palmolive Peet Co. v. N.L.R.B., 70 S. Ct.
166, 171.

La Crosse Tele. Corp. v. Wisc. Emp. Rel. Bd.,
supra.

Matter of Whiteway Pure Milk Co., 82 N.L.R.B.
1225.

Matter of Herold & Sons, Inc., 82 N.L.R.B. 174.

Matter of Guilford Dairy Coop. Assoc., Inc., 81
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Matter of Detroit Canvas Manuf. Assoc., et al., 80 N.L.R.B. 267.

Matter of Golden Crust Baker, 80 N.L.R.B. 762.

N.L.R.B. v. Bell Oil and Gas Co., 98 F. (2d) 870.

N.L.R.B. v. Jones and Laughlin Steel Corp., 331 U.S. 416, 422-426.

N.L.R.B. v. Fred P. Weissman Co., 170 F. (2d) 952, 954-55.

ARGUMENT

In Section 10 (a) of the National Labor Relations Act, 1947, 29 U.S.C.A. 160 (a) (c), 153 (d), it is provided that:

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce.”

Section 10 (c) among other things provides:

“ . . . and to take such affirmative action . . . as will effectuate the policies of the act.”

Section 3 (d) reads:

“The General Counsel of the Board . . . shall have final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board. . . .”

The appellant contends that in view of Section 3 (d) cited above the Board no longer has power to dismiss

a complaint solely on the ground that it would not effectuate the policies of the act to assume jurisdiction. We do not agree.

The purpose of the N.L.R.B. was and still is to promote and foster interstate commerce. Public rights have been vested in a public body charged in the public interest. Congress has seen fit to entrust to an expert agency the maintenance and promotion of industrial peace. The effectuation of this important policy has been left to the Board. The Board must look beyond its ruling in any one particular case as to the effect it may have throughout the country as a whole. No hard and fast rules can be laid down. In order to carry out the intent of Congress the Board must of necessity have wide latitude in its actions. The Board was not intended by Congress to act as a Court but as a quasi-judicial body. Its position as such a fact finding body is not unlike that of a grand jury in a criminal case. See *N.L.R.B. v. Bell Oil and Gas Co.*, 98 F. (2d) 870.

The Act itself specifically delegates to the Board the duty to carry out the purpose of the law. This included the power to dismiss a complaint for policy reasons (see Authorities Footnote 9, N.L.R.B. opinion, Rec. P. 28). The 1947 amendments did not take away from the Board this power and place them in the hands of the General Counsel. Section 3 (d) defining the powers of the General Counsel transferred the investigatory and prosecuting functions previously vested in the Board to the General Counsel. Certainly if Congress intended more it would have made its intention plain by appro-

priate language. Moreover repeal of legislative enactment by inference is not favored by the courts.

Moreover in addition to the cases cited by the Board in its opinion (Footnote 5, Rec. P. 26) the Board has almost continually since the 1947 Amendments continued to dismiss complaints on policy grounds. See following cases:

Matter of Whiteway Pure Milk Co., 82 N.L.R.B. 1225.

Matter of Herold & Sons, Inc., 82 N.L.R.B. 174.

Matter of Guilford Dairy Coop. Assoc., Inc., 81 N.L.R.B. 1334.

Matter of Lewis Bros. Bakeries, Inc., 81 N.L.R.B. 1230.

Matter of Conlon Baking Co., 81 N.L.R.B. 934.

Matter of Detroit Canvas Manuf. Assoc., et al., 80 N.L.R.B. 267.

Matter of Golden Crust Baker, 80 N.L.R.B. 762.

It is not deemed necessary to cite authority for the proposition that where over a long period of time an Administrative Agency has by its actions construed the meaning of legislative enactments without rebuff by the legislature or indeed, the courts, great weight is to be given that administrative construction.

Appellant has reviewed in detail the legislative history of the 1947 amendments. Suffice it to say that nowhere in that history is it indicated that the power of the Board to establish policy was to be taken away. The only intent was to withdraw the power of investigation and prosecution of cases from that of the Board. It was in effect a separation of powers.

The position of the Board has support in the later decisions since the 1947 amendments.

Colgate-Palmolive Peet Co. v. N.L.R.B., 70 S. Ct. 166, 171.

N.L.R.B. v. Jones and Laughlin Steel Corp., 331 U.S. 416, 422-426.

N.L.R.B. v. Fred P. Weissman Co., 170 F. (2d) 952, 954-55.

La Crosse Tele. Corp. v. Wisc. Emp. Rel. Bd.,
supra.

CONCLUSION

It is urged in conclusion that not only should this Court affirm the Board's action in holding that the appellant's operation did not affect commerce within the meaning of the Act but also that the Board does have the power in effectuating policy to refuse to assume jurisdiction.

Respectfully submitted,

GREEN, LANDYE AND RICHARDSON and

BURL L. GREEN,

J. W. BROWN,

Amici Curiae.

United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF

MASTERS & MASTERS,
703 Yeon Bldg., Portland, Oregon,
Attorneys for Petitioner.

IDA KLAUS, Solicitor,
Washington, D. C.,
of Attorneys for Respondent.

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United States
COURT OF APPEALS
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Respondent.

PETITIONER'S REPLY BRIEF

Respondent's position in its Brief before the Court appears to be based upon the proposition that the Board had the right to dismiss the complaint filed by the Petitioner on an unfair labor charge because it did not effectuate their own policy rather than the policy of the Labor Management Relations Act, 1947. The Board dismissed the complaint on the ground that it would

not effectuate the policy of the Act to take jurisdiction. However, at no place in their Brief can be found any statement as to what policy of the Act would not be effectuated. The policy of the Act is very minutely defined in Section 1 (b) and in Section 101, Section 1. The Act particularly legislates against the practices set forth in the complaint where the Act says:

“Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.”

This policy of the Act very definitely provides against practices which have the intent or necessary effect of burdening or obstructing commerce by preventing the free flow of goods in commerce through strikes, etc. That is what they were doing in the case before the Court by the placing of pickets before the places of business of the Petitioner. They most certainly were obstructing commerce by preventing the free flow of goods in such commerce to the Petitioner's place of business.

Respondent, however, has intimated in its Brief that the policy of the Act would not be effectuated because the relation of Petitioner's business to commerce was remote and insubstantial. Petitioner submits that this argument is untenable. Petitioner's position in this case

is that Petitioner has never had a hearing to determine whether the relation of Petitioner's business to commerce was substantial or insubstantial. There is no evidence whatever in this case to substantiate any finding of any kind as there never was a hearing. The Board summarily dismissed the complaint without a hearing and without any evidence being taken from which it could be determined whether the practices of the Union would have any substantial effect upon the free flow of Petitioner's interstate commerce. Consequently, you have a decision based entirely upon a case where there is no evidence whatever. Respondent is attempting to bolster its decision by referring to a previous case, case No. 36 RM 26. This case was between different parties and concerned a different subject matter. It was on a petition for an election filed by the employer, Haleston. The Union in the case before the Court was not involved in that case. Further, the Petitioner in that case had no right of appeal or review since it was a representative case and the Act does not give a right of review or appeal from the decision of the Board; Section 9, Labor Management Relations Act, 1947. Surely each case must stand on the evidence deduced at the trial of that case. The case before the Court covers a different period of time and Petitioner was prepared to prove additional facts with reference to commerce as to whether the commerce feature of the Act was substantial or not. We, therefore, submit to the Court that the previous case is not binding on the Petitioner in this case and should not be used as evidence in this case where the Petitioner had no opportunity to introduce additional evidence.

The policy that the Respondent seems to be depending upon is not one set forth in the Labor Management Relations Act, 1947, but seems to be based more upon the whim of the Board. In other words, the Board seems to be following a policy of deciding under the same state of facts whether they will take jurisdiction or not. In one case they take jurisdiction, and in the other they say it would not effectuate the policy of the Act to take jurisdiction. This is very forcibly demonstrated in the Automobile Dealers cases cited by Petitioner which arose in this District. The dealers involved were all local dealers from a small community in the State of Oregon. Their businesses were absolutely local in character as they sold nothing outside of the State of Oregon. Their purchases from out of state were comparable to those of Petitioner's. Yet, in each of these cases, the Board exercised jurisdiction. If this position is sound, you have an anomalous position, resulting in nothing but confusion. No one, employer, employee, or Union, is going to be able to rely on any state of facts as bringing them within the purview of the Act. They have to gamble wholly upon the whim of the Board. We submit that Congress did not intend that any such confusion should arise and that the Board should have the right to act capriciously. Congress must have intended that every case with the same facts should be decided in the same way.

This decision of the Board is further proved to be based upon a policy of their own by the arguments of the Respondent in its brief that the Board did not have sufficient funds to carry on the case load that they have

and they should, therefore, have the right to take jurisdiction only in those cases which they consider to be of more importance. There is nothing in the decision of the Board in which they state that it is their own policy they are giving effect to rather than the policy of the Act. There is no evidence before this Court to the effect that they did not have sufficient funds to take care of all the cases. The first we hear of this is in Respondent's Brief where it is argued at considerable length that the Board should have the right to refuse jurisdiction in a case that does not seem so important to them because they do not have sufficient money to try all of them. This is not a judicial question for this Court, but should be directed to the attention of Congress. Petitioner submits to this Court that the seeming importance or non-importance of a case has never been a factor in the decisions of our Courts where substantial rights are involved. Although a case may seem to be unimportant as against another case involving more money, it may be very important to the litigant who is having his substantial rights passed upon. He should have the same consideration as any other litigant. The Courts of this country have always treated all persons alike whether large or small, important or unimportant, as long as substantial rights are to be determined.

Petitioner, therefore, submits to this Court that if Petitioner's business is in interstate commerce and the practices of the Union tend to substantially interfere with the free flow of his commerce, the Board has jurisdiction whether it wants to take jurisdiction or not, and it is incumbent upon the Board to hold a hearing to

determine whether these facts are true or not from the evidence. To allow the Board to carry out a policy whereby it can refuse to take jurisdiction in one case and assume jurisdiction in another case where the facts are the same, would violate all legal principles.

Respectfully submitted,

MASTERS & MASTERS,

Attorneys for Petitioner.

No. 12412

**In the United States Court of Appeals
for the Ninth Circuit**

HALESTON DRUG STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

IDA KLAUS,

Solicitor,

NORTON J. COME,

Attorney,

National Labor Relations Board.

JUN 10 1950

CHAS. P. O'BRIEN

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12412

HALESTON DRUG STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the court on petition of Haleston Drug Stores, Inc. (hereinafter called "Haleston" or "petitioner"), filed pursuant to Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 *et seq.*), to review an order of the National Labor Relations Board. The Board's order (R. 33), which was issued in a proceeding under Section 10 of the Act, dismissed an unfair labor practice complaint (R. 5-11) that had been issued by the General Counsel of the Board upon charges filed by petitioner (R. 2-4). This Court has jurisdiction under Section 10 (f) of the Act, for petitioner transacts business in Portland, Oregon, within this judicial circuit.

STATEMENT OF THE CASE

I. Background: The prior representation proceeding before the Board

In October 1948, Haleston filed a petition with the Board, pursuant to Section 9 (c) (1) (B) of the Act, requesting that the Board determine whether employees at its four retail drug stores in Portland, Oregon, desired to be represented, for collective bargaining purposes, by Retail Clerks' International Association, Food and Drug Clerks, Local No. 1092, A. F. L. The petition was docketed as "Case No. 36-RM-26," and a hearing thereon was held before a hearing officer of the Board. (R. 67, 34-66.) At the hearing, the Union moved to dismiss the representation petition on the ground "that the operation of the Employer is not one which affects interstate commerce, and that, even if it does affect interstate commerce, then it would not effectuate the policies of the Act to exercise jurisdiction" (R. 67-68).

On April 15, 1949, the Board issued its decision and order in Case No. 36-RM-26. Upon the record formulated at the hearing, the Board made the following findings respecting Haleston's business (R. 68):

The Employer-Petitioner, an Oregon corporation, operates four retail drug stores in Portland, Oregon, at each of which it sells conventional lines of drugs and cosmetics, operates a soda fountain, and prepares and sells medical prescriptions. During the period from January 1, 1948, to December 15, 1948, the Employer made purchases for resale totaling \$189,157.39, of which approximately 30.15 percent was shipped to the Employer directly from points outside the State of Oregon. Approxi-

mately 60 to 75 percent of the purchases made within the State was of goods originating outside the State, having been purchased from warehouses engaged in interstate commerce including McKesson & Robbins, Upjohn Company, and Sharpe & Dohme. Sales during the same period totaled \$308,011.21, all being made locally at the Employer's drug stores.

On these facts, the Board concluded that it would not "effectuate the policies of the Act to assert jurisdiction inasmuch as the Employer's business is essentially local in character." Accordingly, the Board ordered that Haleston's representation petition be dismissed. (R. 69.)

II. The initial stages of the instant unfair labor practice proceeding

On March 15, 1949, shortly before the Board had dismissed its representation petition, Haleston filed an amended unfair labor practice charge with the Board's Regional Director for the Nineteenth Region. This charge, docketed as "Case No. 36-CB-7," alleged that the Culinary Workers Alliance¹ was, in violation of Section 8 (b) (2) of the Act,² attempting to force Haleston to sign a collective-bargaining contract which contained illegal union security provisions. (R. 2-4.)

¹ Consisting of "Waitresses and Cafeteria Women's Local No. 305; Cooks and Assistants Local No. 207; Waiters Local No. 189; Bartenders, Card and Poolroom Workers Local No. 496; Hotel Service Employees Local No. 664; and Local Joint Executive Board of H. & R. E. I. A. and B. I. L. of A." (R. 5).

² This and other relevant sections of the Act are set forth in the Appendix, *infra*, pp. 54-65.

Before investigation of the charge, pursuant to Section 10 (b) of the Act, was completed, the Board had entered its order dismissing Case No. 36-RM-26. Nevertheless, on completion of such investigation, the General Counsel of the Board, acting through the Regional Director and pursuant to Section 3 (d), issued an unfair labor practice complaint. (R. 5-11.) Thereupon, the respondent Union filed with the Board a motion to dismiss the complaint, for the reasons (R. 12):

1. That the employer involved is not engaged in an operation in commerce or affecting commerce.

2. That, even if it does affect interstate commerce, it would not effectuate the policies of the Act to exercise jurisdiction.

See *In re Haleston Drug Store, Inc.* * * *
Case No. 36-RM-26, April 15, 1949.

A Trial Examiner having been appointed in the case, the Board, pursuant to Section 203.25 of its Rules and Regulations,³ referred the motion to him for action (R. 15). On August 15, 1949, the Trial Examiner granted the motion to dismiss (R. 16-17). His ruling was predicated on "the commerce allegations in the complaint," and on "official notice of the findings and conclusions of the Board" in Case No. 36-RM-26, "wherein the Board * * * concluded that 'it would not effectuate the policies of the Act to

³ "The Trial Examiner designated to conduct the hearing shall rule upon all motions. * * * The Trial Examiner may, before the hearing, rule on motions filed prior to the hearing, and shall cause copies of his ruling to be served upon all the parties."

exercise jurisdiction' " over Haleston's business (R. 17).

Haleston filed a motion with the Trial Examiner, requesting reconsideration of the dismissal (R. 17-18). Haleston contended: (1) that the Trial Examiner "had no evidence before him at the time of making" his ruling; (2) that the Trial Examiner erroneously relied on Case No. 36-RM-26, for that case involved different parties and issues (R. 18). Attached to this motion was an affidavit (R. 19-21) containing "additional" evidence on the scope of Haleston's operations.

The General Counsel of the Board also sought reconsideration of the Trial Examiner's action, filing a request for review thereof with the Board (R. 21-23). The General Counsel contended that "the Trial Examiner erred (1) in failing to find that the Employer's operation affects commerce within the meaning of the Act, and (2) in refusing to exercise jurisdiction even though such jurisdiction exists in fact" (R. 23).

III. The Decision and Order of the Board sought to be reviewed

On October 31, 1949, the Board, after considering the motions of Haleston and of the General Counsel, and the entire record in the proceeding, affirmed the Trial Examiner's action and entered an order dismissing the complaint in the unfair labor practice proceeding, Case No. 36-CB-7 (R. 23-33).

The Board held that the Trial Examiner properly took official notice of the record and findings of the Board in the prior representation proceeding involving Haleston (R. 25). However, the Board went

on to consider "the additional facts which the Employer and the General Counsel offer to prove concerning the relationship of the Employer's business to commerce," and found that (R. 25-26):

The amounts of the various transactions differ quantitatively from those which appear in the record of the representation proceeding. Nevertheless they still show no more than that the Employer operates a chain of retail drug stores in Portland, Oregon, making substantial out-of-State purchases but selling all of its merchandise locally. That is precisely the situation that presented itself in the representation case * * *.⁴

The Board then considered the General Counsel's contention that, once he has issued an unfair labor practice complaint, the Board is without discretion to dismiss the complaint "solely because it believes that to assert jurisdiction would not effectuate the policies of the Act" (R. 26-27). After a careful and exhaustive analysis of the Board's functions under the original and amended Acts, and of the relevant legislative history of the amended Act (R. 27-31), the Board rejected this contention. It concluded that the provisions of Section 3 (d) of the amended Act, which created the independent office of General Counsel and vested the General Counsel with final authority "in respect of the investigation of charges and issuance of complaints under Section 10," did not deprive the

⁴ The Board added (R. 25-26, n. 4): "The fact that the Employer makes an unspecified quantity of sales to transients from out of the State who may be staying at the hotels in which its stores are located does not establish a substantial volume of out-of-State sales sufficient to require us to reverse our earlier finding."

Board of its power to dismiss a complaint for policy reasons (R. 32).

On the facts of this case, the Board further concluded that it was proper to exercise such power here, for retail drug stores are “essentially local operations” (R. 26), and therefore “interruption of the Employer’s business operations by a labor dispute would have only a remote and insubstantial effect on commerce” (R. 33). Accordingly, the Board, like the Trial Examiner, dismissed the complaint on the ground that it would not effectuate the policies of the Act to assert jurisdiction over Haleston’s business (R. 24, 33).

ARGUMENT

INTRODUCTION

The principal question here is whether, after an unfair labor practice complaint has been issued in a case involving an enterprise which affects commerce within the meaning of the Act,⁵ the Board has discretionary authority to decline to assert jurisdiction if it concludes that this course would best effectuate the policies of the Act. We shall show (pp. 9-43, *infra*)

⁵ Although petitioner devotes one-half of its brief (Br., pp. 4-12) to a demonstration that Haleston’s operation is, as a matter of law, subject to the Board’s jurisdiction, it concedes at the outset that the Board so found. Thus petitioner states (Br., p. 2): “After the hearing, the Board held that *even though the Petitioner’s operations were in commerce or affecting commerce*, it did not effectuate the policies of the Act to take jurisdiction. * * *” [Emphasis added.] Petitioner’s concession is correct for, though the Board’s decision does not specifically recite that Haleston’s operations are covered by the Act, the basis of such decision necessarily presupposes that this is so. See also, pp. 43-44, *infra*.

that the Board is vested with this authority, and that it may properly be exercised where, as here, the Board has found that “interruption of the Employer’s business operations by a labor dispute would have only a remote and insubstantial effect on commerce” (R. 33).

There is also presented the subsidiary question of whether the Board was reasonable in concluding, from the facts of this case, that the relation of petitioner’s business to commerce was “remote and insubstantial.” We submit that this question is not subject to judicial review (pp. 43–49, *infra*), but that, in any event, the Board’s determination was reasonable and proper (pp. 49–53, *infra*).⁶

⁶ Petitioner, in this Court, appears to have abandoned the contention, urged before the Board (R. 18), that the Trial Examiner erred in taking official notice of the facts found by the Board in the prior representation proceeding involving Haleston. The Board’s rejection of this contention (R. 24–25) is overwhelmingly supported by judicial authority. See Davis, *Official Notice*, 62 Harv. L. Rev. 537; *U. S. v. Pierce Auto Lines*, 327 U. S. 515; *S. E. C. v. Chenery Corp.*, 332 U. S. 194, 204; *Market Street R. Co. v. Railroad Commission*, 324 U. S. 548, 561–562; Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001, *et seq.*), Section 7 (d).

It is significant, moreover, that the Board did not rest solely on the evidence in the prior representation case. The Board went on to consider the additional facts which petitioner and the General Counsel offered to prove, and, on the basis of those facts alone, concluded that Haleston’s operations were essentially local (R. 25–26). That the Board assumed the truth of these facts, without having them proved in an adversary hearing, creates no procedural problem (cf. Pet. Br., p. 3). The Union’s motion to dismiss the complaint (R. 11–12) was analogous to a motion to dismiss in a judicial proceeding. Courts consistently, when passing upon the legal sufficiency of the latter type of motion, assume without further proof the validity of the facts pleaded.

POINT I

The Board has discretionary authority to dismiss an unfair labor practice complaint, even though the operations affect commerce, if it finds that a dismissal would best effectuate the policies of the Act

A. The Board had such authority under the original Act

The original National Labor Relations Act (49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*), instead of conferring “private rights,” granted only rights “in the interest of the public” to be protected by “a public procedure, looking only to public ends.”⁷ The Board, a “single paramount administrative or quasi-judicial authority” (S. Rep. No. 573, 74th Cong., 1st Sess., p. 15), was vested with exclusive primary jurisdiction to protect these rights and “to give effect to the declared public policy of the Act.” *Nat’l Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362. Thus Section 10 (a) of the Wagner Act provided that:

The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. [Emphasis added.]

For the Board to administer the provisions of the statute so as to give effect to its declared public policy,

⁷ *Agwilines, Inc. v. N. L. R. B.*, 87 F. 2d 146, 150–151 (C. A. 5). See also *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265–269; *Nat’l Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362–364.

Congress “reposed in the Board complete discretionary power to determine in each case whether the public interest requires it to act.” *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), cert. den., 314 U. S. 693. The Board’s unfair labor practice jurisdiction was “not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 as to require its restraint in the public interest” (*Ibid.*).⁸ This was evidenced by the language of Section 10 (a) which “empowered” rather than “directed” the Board to prevent unfair labor practices, and by that of Section 10 (b) which read: “Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * shall have power to issue * * * [a] complaint.” [Emphasis added.]

Moreover, when the Board had exercised its jurisdiction and found that unfair labor practices were committed, it was entrusted with broad discretion to determine what remedy would effectuate the policies of the Act.⁹ Finally, the statute left it to the Board’s

⁸ See also, *N. L. R. B. v. Walt Disney Products*, 146 F. 2d 44, 48 (C. A. 9), cert. den., 324 U. S. 877.

⁹ Section 10 (c), insofar as material, read as follows: “If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board * * * shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.”

discretion to determine whether or not to seek enforcement of its unfair labor practice orders in the courts.¹⁰

In short, as the Board concluded here (R. 28), the original Act permitted the Board "to make policy determinations at every stage of [an unfair labor practice] proceeding." It is significant, too (see pp. 37-41, *infra*), that such permissive power with respect to unfair labor practices was accompanied by an equally comprehensive discretion with respect to the representation provisions of the statute.¹¹

It is not open to question that the Board, under this statutory scheme, could, for reasons of policy or for other reasons, decline to issue an unfair labor practice complaint.¹² It is equally clear that, after a complaint

See also, H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24; S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 194-195. Cf. *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 46-47.

¹⁰ Section 10 (e) of the Act provided that: "The Board *shall have power* to petition any circuit court of appeals of the United States * * * for the enforcement of such order * * *." [Emphasis added.] See also, *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *N. L. R. B. v. Sunshine Mining Co.*, 125 F. 2d 757, 761 (C. A. 9).

¹¹ Section 9 (c) of the original Act provided that: "Whenever a question affecting commerce arises concerning the representation of employees, the Board *may investigate* such controversy * * *." [Emphasis added.] See also, *Inland Empire v. Millis*, 325 U. S. 697, 706-707; *N. L. R. B. v. A. J. Tower Co.*, 329 U. S. 324, 330-331; *Packard Motor Car Co. v. N. L. R. B.*, 330 U. S. 485, 491.

¹² *National Labor Relations Act*, Section 10 (b); *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18-19; *N. L. R. B. v. Barrett Co.*, 120 F. 2d 583, 586 (C. A. 7); *Jacobsen v. N. L. R. B.*, 120 F. 2d 96, 99-100 (C. A. 3); *N. L. R. B. v.*

had been issued, the Board could dismiss the complaint without determining the existence of unfair labor practices, if in its opinion the policies of the Act would best be served thereby. Thus, the Supreme Court, in the *Indiana & Michigan Electric Co.* case,¹³ specifically held that (318 U. S. at 19):

The Board might properly withhold *or dismiss* its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process. [Emphasis supplied.]

Furthermore, the Board, throughout the life of the original Act, dismissed complaints for a variety of other policy reasons, and the courts consistently recognized that the Board—as an incident of its quasi-judicial power to determine whether unfair labor practices have been committed and whether the public interest required their vindication—possessed the discretion to make such decisions.

For example, in *Godchaux Sugars, Inc.*, 12 N. L. R. B. 568, 576–579, the Board, having found that respondent had entered into a proper settlement agreement, dismissed the complaint on the ground that the policies of the Act would best be served by giving effect to the agreement and refraining from

Natl Broadcasting Co., 150 F. 2d 895, 899 (C. A. 2); *Anthony v. N. L. R. B.*, 132 F. 2d 620 (C. A. 9); *Progressive Mine Workers v. N. L. R. B.*, 3 Labor Cases, Par. 60, 133 (C. A. D. C.); *White v. N. L. R. B.*, 9 L. R. R. M. 657 (C. A. D. C.).

¹³ *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9.

consideration of the alleged unfair labor practices.¹⁴ Passing upon the propriety of this type of determination, the Court of Appeals for the Sixth Circuit concluded that since the Board's "function is to be performed in the public interest and not in vindication of private rights [, the] Board is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned."¹⁵

In *Consolidated Aircraft Corp.*, 47 N. L. R. B. 694, 706-707, where the charging party had ignored the grievance and arbitration machinery established by a collective bargaining contract, the Board dismissed those portions of the complaint which alleged a refusal to bargain and the discriminatory discharge of certain employees, holding that the exercise of jurisdiction in such case would not "effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining.'"¹⁶ Similarly, in *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 501, where the union had previously submitted the matter to arbitration as provided for by collective bargaining contract, the Board dismissed the complaint insofar as it alleged that respondent's unilateral issuance of

¹⁴ See also, *Shenandoah-Dives Mining Co.*, 11 N. L. R. B. 885, 887-888; *Wickwire Bros.*, 16 N. L. R. B. 316, 325; *Midwest Piping and Supply Co.*, 63 N. L. R. B. 1060, 1074-1075.

¹⁵ *N. L. R. B. v. Federal Engineering Co.*, 153 F. 2d 233, 234. See also, *Wallace Corp. v. N. L. R. B.*, 323 U. S. 248, 253-255; *N. L. R. B. v. General Motors Corp.*, 116 F. 2d 306, 311-312 (C. A. 7).

¹⁶ The Board issued an order as to the remainder of the complaint, which was enforced with modification by this Court. *Consolidated Aircraft Corp. v. N. L. R. B.*, 141 F. 2d 785.

the "Employees' Manual" constituted a refusal to bargain. The Board stated (p. 501): "it would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings." These cases are merely an application of the holding of this Court, in the *Walt Disney* case,¹⁷ that the question of whether "the grievance and arbitration procedures established in a prevailing collective bargaining agreement" will preclude the Board from finding that unfair labor practices have been committed is within the "discretionary power" of the Board.

Again in *Allis-Chalmers Mfg. Co.*, 72 N. L. R. B. 855, the Board, having found that the company and the union had during the pendency of Board proceedings entered into a collective bargaining contract, dismissed a complaint alleging refusal to bargain for the reason that, in view of the Board's heavy case load and budgetary limitations, "the larger purpose and policy of the Act would not be effectuated by * * * proceeding further."¹⁸ And in *Brown & Root, Inc.*, 51 N. L. R. B. 820, the Board dismissed a complaint against certain construction firms engaged in the erection of a Naval Air Training Center, on the ground, *inter alia*, that the assertion of jurisdic-

¹⁷ *N. L. R. B. v. Walt Disney Productions*, 146 F. 2d 44, 47-48, cert. den., 324 U. S. 877. Cf. *Int'l Bro. v. Int'l Union*, 106 F. 2d 871, 874-876 (C. A. 9); *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9).

¹⁸ Cf. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 776.

tion over the operations of respondents would not effectuate the policies of the Act.¹⁹

The *Brown & Root* case is particularly significant, for it shows that one of the reasons which led the Board to conclude that an assertion of jurisdiction would not effectuate the policies of the Act was the nature of the employer's business.²⁰ *Brown & Root* therefore parallels the instant case, wherein the Board, as it had done in the prior representation proceeding, dismissed the complaint for the reason that, "since interruption of the Employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33), it would not effectuate the policies of the statute to assert jurisdiction.

There was no doubt under the original Act as to the propriety of the Board's taking the factor of the effect

¹⁹ Additional instances where the Board dismissed a complaint for policy reasons are: *Pacific Plastic & Mfg. Co.*, 68 N. L. R. B. 52, 54 (discriminatory discharge allegation of complaint dismissed because employee unavailable as witness and had failed to advise Board of his whereabouts); *The N and G Taylor Co.*, 21 N. L. R. B. 1162, 1167-1168 (complaint dismissed when it appeared that employer corporation had been dissolved, its operations discontinued, and the union had ceased activities as a labor organization). Likewise, for reasons of administrative policy, the Board often issued no findings or order where a respondent had complied with the recommendations of an Intermediate Report to which no exceptions were filed. Cf. *Pennsylvania Greyhound Lines*, 13 N. L. R. B. 28, 31-32.

²⁰ The explanation for the decision is that the "building construction industry" was involved (*Brown Shipbuilding Co.*, 57 N. L. R. B. 326, 328, n. 4), an industry "over which the Board does not customarily assert jurisdiction." *Johns Manville Corp.*, 61 N. L. R. B. 1, 2.

on commerce into consideration, before determining whether or not to proceed to a decision on the merits. Nor was there any doubt that the Board, in dismissing a complaint for the policy reason of remote effect upon commerce—as when it dismissed for any of the other policy reasons described (pp. 12–14, 15, n. 19, *supra*), or because the record failed to establish a violation of the statute—was exercising its quasi-judicial power to decide whether unfair labor practices had been committed and whether the public interest required redress thereof. Thus, Section 1 of the Wagner Act admonished the Board, as does indeed the amended Act (see p. 37, *infra*), “to eliminate the causes of certain *substantial* obstructions to the free flow of commerce.” [Emphasis added.] In amplifying this mandate, the Supreme Court declared:²¹

Where the employees are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers’ intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial manner* is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority. *The justification for the exercise of federal power should clearly appear*
* * *. But the question in such a case would

²¹ *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 223–224.

relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts. [Emphasis added.] ²²

This statement reveals specific recognition by the Court of the Board's authority to decline, for the policy reason of remote effect upon commerce, to assert jurisdiction even though it existed in the constitutional sense, and of the fact that this authority was no different from the Board's power to refuse, for some other policy reason, to find an unfair labor practice though the record would have supported such finding.

In sum, it is abundantly evident that, under the original Act, the action taken here would have been within the Board's authority. The Board, notwithstanding the issuance of a complaint and the existence of legal jurisdiction, had power to conclude, for the reason that petitioner's business only remotely affected commerce, that the purposes of the Act would best be served by dismissing the proceeding.

The *Jacobsen* case,²³ relied on by petitioner (Br., p. 15), does not hold to the contrary. There the Board had issued a complaint, held a hearing, and entered a decision and order finding unfair labor practices and directing that they be remedied. Four years later, the Board vacated its original decision and order and dismissed the complaint, for the reason that (120 F. 2d at 98-99):

²² Cf. *N. L. R. B. v. Eanet d/b/a Parkside Hotel*, 179 F. 2d 15, 17-18 (C. A. D. C.).

²³ *Jacobsen v. N. L. R. B.*, 120 F. 2d 96 (C. A. 3), setting aside and remanding *Protective Motor Service Co.*, 21 N. L. R. B. 552.

We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the meaning of the Act. * * * In view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point.

The employees who had filed the unfair labor practice charges thereupon requested the Board to reopen the case and permit them to introduce additional evidence. When the Board denied this request, they petitioned the Court of Appeals to review the Board's dismissal of the complaint and to direct the Board to take further evidence on the commerce question.

The Court, although admitting that the Board had discretion to withhold a complaint (p. 100), went on to rule (p. 101) that: "the Board having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the *Protective Motor Service Company* affected commerce within the meaning of the act, and in our opinion it was error for the Board not to do this." The Court also held (p. 101) that the Board's refusal to receive additional evidence on the issue of interstate commerce was "an abuse of discretion." Accordingly, the Court set aside the Board's order dismissing the complaint, and remanded the case to the Board with directions "to reinstate the complaint, to allow the petitioners a reasonable opportunity to

present the evidence referred to in their petitions, and to determine the issue of interstate commerce, and if it be found that the operations of *Protective Motor Service* do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto" (*Ibid.*).

This language, considered in the light of the precise problem before the Court, does not hold that the Board, under the Wagner Act, lacked authority to dismiss an unfair labor practice complaint for sound policy reasons. The Board had not, as here, determined, on the basis of an adequate record of commerce facts, that the assertion of jurisdiction would not effectuate the policies of the Act. Instead, it "took inconsistent positions. It stated that the record did not afford a basis for determining whether the operations of [the employer] affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue" (pp. 100-101). Consequently, the Court merely decided that, under these circumstances, there "was not sufficient reason" (p. 101) for the Board's refusal to decide the merits. In other words, the Court held that the Board could not avoid consideration of the merits through a capricious refusal to decide, or take material evidence on, the essential preliminary question of its own jurisdiction. See *Note*, 63 Harv. L. Rev. 522, 523-524. The Court did not decide that the Board is precluded from withdrawing its process where, as

here, it did determine, upon a consideration of all material facts, the essential preliminary question of the effect on commerce and did indicate clearly in making its finding "that it has exercised the discretion with which Congress has empowered it" (*Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 197)—thereby establishing that there was "sufficient reason" for its action.²⁴

²⁴ The Court's direction to the Board to determine whether unfair labor practices had been committed and to issue an appropriate order in respect thereto is consistent with the above analysis. Since there was nothing in the record which indicated that the Board had a valid policy reason for declining to decide the merits, the Court properly concluded that, if the Board found that the conduct charged affected commerce, the Board would, under these circumstances and in accordance with its applicable standards, proceed to determine whether unfair labor practices had occurred. This is precisely what the Board did on remand. *Protective Motor Service Co.*, 40 N. L. R. B. 967.

The validity of the above analysis is further shown by the excerpt from the *Newark Morning Ledger* case quoted in the text (p. 10, *supra*). This case was decided by the same judges who decided *Jacobsen*, the two decisions being a month apart. It is highly improbable that a court which held that, under the language of Section 10 of the Wagner Act, the Board could refuse to exercise its jurisdiction unless in its opinion "the unfair labor practice complained of" is so substantial "as to require its restraint in the public interest" would, one month later, so narrow the same statutory provisions as to confine this authority to situations where a complaint has not yet issued (120 F. 2d at 100). Obviously, the preliminary investigation of the charge, on the basis of which a complaint is issued, does not always reveal every fact relevant to a determination of whether the public interest requires restraint of the unfair labor practice. See also, *N. L. R. B. v. Philips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. A. 3), in which the same court acknowledged the Board's authority to refuse to find unfair labor practices as a matter of discretion.

B. The amendments to the original Act did not eliminate the Board's prior discretion to dismiss a complaint for policy reasons

Title I of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 *et seq.*), which amended the original National Labor Relations Act, provided for "a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate * * *." *Act, as amended*, Section 3 (d). Section 3 (d) further provides that the General Counsel:

shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.²⁵

Aside from this change, and certain modifications in Section 10 which conferred a limited jurisdiction on the federal district courts to grant preliminary injunctive relief against unfair labor practices,²⁶ there is "nothing in either the text or the history of the

²⁵ The Board has delegated to the General Counsel a number of other functions, including "full authority and responsibility" over the preliminary stages of representation proceedings under Section 9 (c) (1). See *Memorandum Describing Statutory and Delegated Functions of the General Counsel*, 13 F. R. 654-655; 15 F. R. 1088-1090. Cf. *Evans v. I. T. U.*, 76 F. Supp. 881, 886-889 (S. D. Ind.); *N. L. R. B. v. I. T. U.*, 76 F. Supp. 895, 898-899 (S. D. N. Y.).

²⁶ See *California Ass'n v. Bldg. Trades Council*, 178 F. 2d 175 (C. A. 9); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (C. A. 4); *Amalgamated Ass'n v. Dixie Motor Coach Ass'n*, 170 F. 2d 902 (C. A. 8).

Labor Management Relations Act to indicate * * * any intention to change the method by which unfair labor practices were dealt with under the [original Act].” *Amazon* case, 167 F. 2d at 186. Indeed, the relevant language of Sections 10 (a) through (f) of the amended Act, dealing with the procedure for the prevention of unfair labor practices, is virtually identical with that of the original Act.

Accordingly, it has been held that the authority to issue or refuse to issue an unfair labor practice complaint, which under the original Act was discretionary with the Board (see cases cited n. 12, pp. 11-12, *supra*), remains a matter of discretion under the amended Act, the only difference being that such discretion is vested in the General Counsel rather than in the Board.²⁷ Moreover, after a complaint has been issued, the Board still has the duty and function of determining whether unfair labor practices have been committed, what remedy would best effectuate the policies of the statute, and whether to seek enforcement of its order in the courts.^{27a} As before, the Board vindicates “public” rather than “private” rights.²⁸ And, as under the original Act, the flexibility of the unfair labor practice provisions is paralleled by the equally

²⁷ *Lincourt v. N. L. R. B.*, 170 F. 2d 306 (C. A. 1); *Wilke v. N. L. R. B.*, 15 Labor Cases, Par. 64, 799 (C. A. 4); *Gen'l Drivers v. N. L. R. B.*, 179 F. 2d 492 (C. A. 10).

^{27a} See *N. L. R. B. v. Pool Mfg. Co.*, 26 L. R. R. M. 2127, 2128 (S. Ct., May 15, 1950).

²⁸ *Steelworkers v. N. L. R. B.*, 170 F. 2d 247, 266 (C. A. 7), *affd.*, 26 L. R. R. M. 2084 (S. Ct., May 8, 1950); *N. L. R. B. v. Budd Mfg. Co.*, 169 F. 2d 571, 577 (C. A. 6), *cert. den.*, 335 U. S. 908.

broad discretion which Section 9 entrusts to the Board with regard to representation matters.²⁹

Congress was undoubtedly well aware that the Board, under the original Act, not only had, but frequently exercised (see pp. 12-15, *supra*), the discretion to dismiss unfair labor practice complaints for policy reasons. Thus, by substantially retaining the basic pattern of the original Act and the flexible power which it conferred upon the Board, it is to be presumed, absent other evidence, that Congress, in amending the Act, did not deprive the Board of such discretion. *N. L. R. B. v. Barnes Corp.*, 178 F. 2d 156, 160-161 (C. A. 7); *Queensboro Farms Products, Inc. v. Wickard*, 137 F. 2d 969, 977 (C. A. 2). We shall demonstrate that, contrary to the contentions of petitioner here and of the General Counsel before the Board, this presumption is entirely compatible with the final authority conferred on the General Counsel by Section 3 (d), and with Congress' intention to effect a separation of prosecutory and adjudicatory functions. Indeed, a consideration of the legislative history of Section 3 (d), the interrelation between representation and unfair labor practice proceedings, and the recent decision in the *Electrical Workers* case (*infra*, pp. 41-43) affirmatively disclose that the Board still possesses discretionary authority to dismiss an unfair labor practice complaint for policy reasons, including the reason that the interruption of an employer's operations by a labor dispute would have only a remote effect on commerce.

²⁹ See, e. g., S. Rep. No. 105, 80th Cong., 1st Sess., pp. 12, 25; *Mueller Brass Co. v. N. L. R. B.*, 180 F. 2d 402 (C. A. D. C.).

1. *The language and legislative history of Section 3 (d)*

Petitioner's argument that the amendments to the Act deprive the Board of its prior authority to dismiss a complaint for policy reasons rests largely on the premise that the existence of such authority is negated by Section 3 (d) (Br., pp. 13-23).³⁰ As previously noted (p. 21), this provision vests the General Counsel with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board."

³⁰ Insofar as petitioner intends to suggest, by the discussion appearing at pp. 7-12 of its brief, that the broad coverage of the Act manifests the Congressional intent that jurisdiction must be asserted over every enterprise which, as a matter of law, would come within the Act's reach, this contention is clearly untenable.

First, petitioner does not deny that, in representation cases, the Board, as it did in Case No. 36-RM-26 involving Haleston, has discretionary authority to withhold its processes even though legal jurisdiction exists (see pp. 37-39, *infra*).

Second, the language of Section 10 (b) and the cases interpreting it (see pp. 10-11, 22, *supra*), compel the conclusion that, in unfair labor practice cases as well, the exercise of jurisdiction, at least at the complaint stage, is entirely discretionary. In other words, there is no question that, under the amended Act, the General Counsel, notwithstanding the broad coverage of the Act, has discretionary authority to refuse to issue a complaint even though legal jurisdiction exists. The question is thus, not whether there is power to withhold jurisdiction which otherwise exists, but rather who may exercise this power—solely the General Counsel; or the Board as well, upon review of a complaint issued by the General Counsel.

Finally, it is common knowledge respecting administrative agencies that "unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns." *U. S. v. Morton Salt Co.*, 338 U. S. 632, 647-648. See also, pp. 44-45, *infra*.

The plain meaning of this language would appear to be that the Board “may no longer exercise a discretionary judgment at the beginning of an unfair labor practice proceeding”—i. e., the “General Counsel has the unfettered discretion to determine whether to issue a complaint and how to prosecute it” (R. 31). Accordingly, as the Board has recognized,³¹ it cannot compel the General Counsel either to issue or refrain from issuing a complaint, or review his action in refusing to issue one.

Petitioner, however, would draw still more from the language—i. e., a limitation on the Board’s decisional process. Thus it argues (Br., pp. 14–16) that the General Counsel’s issuance of a complaint cannot be “final” unless the Board, when the record has been completed and the case has come to it for decision, is bound by his prosecution policy judgment that the exercise of jurisdiction would effectuate the purposes of the Act.

The flaw in this reasoning is that the Board—as petitioner does not deny—has authority to overrule the General Counsel’s prosecution judgment on whether certain conduct constitutes an unfair labor practice within the meaning of the Act.³² If a Board decision dismissing a complaint on the merits does not encroach upon the General Counsel’s “final authority”

³¹ *Times Square Stove Corp.*, 79 N. L. R. B. 361, 363–366; *Columbia Pictures Corp.*, 85 N. L. R. B. No. 186, 24 L. R. R. M. 1521 (August 31, 1949).

³² E. g., *Int’l Bro. of Teamsters (Conway’s Express)*, 87 N. L. R. B. No. 130, 25 L. R. R. M. 1202 (December 16, 1949); *Oil Workers Int’l Union (Pure Oil Co.)*, 84 N. L. R. B. No. 38, 24 L. R. R. M. 1239 (June 17, 1949).

under Section 3 (d), why does a contrary Board decision on policy grounds?³³ Both types of decisions equally limit the discretion of the General Counsel, in the sense that they would provide a rule for self-limitation as to future charges involving similar situations. Both types of decisions, moreover, are procedurally indistinguishable. Each is predicated on the Board's basic authority to determine the issues in an unfair labor practice proceeding; each must be based upon a record duly compiled in accordance with the procedures provided by the statute; each must be accompanied by findings of fact; and each results in a setting aside of the process by which the General Counsel initiated the proceeding. In the light of these circumstances, petitioner's purported distinction is without merit.

Petitioner, at this point, retreats to the legislative history of Section 3 (d) (Br., pp. 17-23), which, rather than supporting, completely repudiates its contention. In a piece of history overlooked by petitioner, Senator Taft described the purpose of Section 3 (d) as follows (93 Cong. Rec. 6859, June 12, 1947):

* * * In order to make an effective separation between the judicial and prosecuting functions of the Board * * * the conferees

³³ We have shown (pp. 12, 16-17, *supra*) that no distinction may properly be drawn between the Board's authority to dismiss a complaint for the policy reason of remote effect upon commerce (as in the instant case) and its authority to dismiss for some other policy reason. Under the amended Act, as under the Wagner Act (pp. 12-17, *supra*), the Board has declined to decide the merits for a variety of reasons. Cf. this case with *Sunray Oil Corp.*, 82 N. L. R. B. 942, and *Rice-Stix of Arkansas, Inc.*, 79 N. L. R. B. 1333-1334.

created the office of general counsel of the Board, * * *. We invested in this office final authority to issue complaints, prosecute them before the Board, and supervise the field investigating and trial personnel. * * *

The Board itself * * * in recent years has promulgated regulations which have delegated the power of issuing complaints to the various regional directors. * * * The present regulations permit a person aggrieved by the refusal of a regional director to issue a complaint to appeal the matter to Washington. * * * According to the testimony of the Chairman of the Board these appeals are considered by an anonymous committee of subordinate employees. *What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory officer responsible to the President and to the Congress.* * * * [Emphasis added.]

From this statement, it is clear that the prime objective of Section 3 (d) was to transfer, from "an anonymous committee of subordinate employees" to "a statutory officer responsible to the President and to the Congress," the final decision as to whether an unfair labor practice charge should be prosecuted.

Thus Senator Taft, as well as the other spokesmen cited by petitioner (Br., pp. 20-22), intended, as the Board has recognized (p. 25, *supra*), that the General Counsel alone should determine whether a complaint is to issue. However, neither Senator Taft, nor petitioner's authorities, disclose the further intention that the General Counsel, by exercising his unre-

viewable discretion to prosecute, would limit the Board's decisional process. On the contrary, the Taft statement concludes with the observation that (93 Cong. Rec. 6859, June 12, 1947):

So far as having unfettered discretion is concerned he [the General Counsel], of course, must respect the rules of decision of the Board and of the courts. * * *

Senator Taft repeated the same thought in the comment quoted by petitioner (Br., p. 20):

Under this bill, the counsel will have the right to make the decision as between employer and employee; *but his decision will be subject to the judicial decision of the Board* and, above the Board, the courts * * *. [Emphasis added.]

Quite properly, Senator Taft drew no distinction between a Board decision on the merits and a Board decision on policy grounds (see pp. 25-26, *supra*). His pronouncements therefore patently indicate that the General Counsel's "final authority" under Section 3 (d) ends "once the complaint has issued and the case has been submitted to the Board for decision" (R. 31). Any action which the Board may take thereafter—whether on the merits or on policy grounds—is an exercise of its decisional power, to which the General Counsel's prosecution power is ultimately subjected.

If any further evidence were required to establish that Section 3 (d) does not preclude the Board from overriding the General Counsel's policy judgments as well as his judgments on the merits, it is afforded by the 1949 hearings on proposed amendments to the

present Act.^{33a} Board Chairman Herzog, in the course of his testimony before the Senate Labor Committee, raised the very problem presented here—i. e., the conflict between the General Counsel and the Board on the assertion of jurisdiction over local enterprises. Senator Taft replied: “The time will come when you can overrule him.”³⁴

Similarly, in the recent hearings on the President’s Reorganization Plan No. 12, which would have abolished the independent office of General Counsel, Senator Taft, in commenting on the same problem, emphasized that under the present statutory scheme: “Gradually these differences between the Board and the General Counsel, * * * will be resolved by the Board, *and of course the Board has the final word.*” [Emphasis added.]³⁵ He added that: “I would say that the Board should make some declaration of policy and that the General Counsel should follow that declaration of policy. Of course, he is bound to do it in the end, * * *.”³⁶

^{33a} Cf. *Herzog v. Parsons*, 25 L. R. R. M. 2413, 2418 (C. A. D. C., February 20, 1950); *Farmers Irrigation Co. v. McComb*, 337 U. S. 755, 769, n. 20.

³⁴ *Hearings before the Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., p. 176. See also, Senator Taft’s statement on the floor of Congress, 95 Cong. Rec. 8750.

³⁵ *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2nd Sess., p. 36.

³⁶ *Id.*, at 40. It should also be emphasized that this post-legislative history does more than demonstrate that the General Counsel’s final authority under Section 3 (d) is subject to the Board’s decisional power, including the power to dismiss cases for policy reasons. The history reveals Congressional *approval* of the Board’s policy of declining jurisdiction in cases (like the

2. The doctrine of separation of functions

As a corollary to the contention that the General Counsel's "final authority" under Section 3 (d) precludes the Board from dismissing a complaint for policy reasons, petitioner asserts (Br., pp. 14, 17-19) that this result is compelled by the doctrine of "separation of adjudicating and prosecuting functions," which Congress sought to effectuate by creating the independent office of General Counsel. This contention is likewise erroneous.

According to Walter Gellhorn, Director of the Attorney General's Committee on Administrative Procedure:³⁷

The opposition to lodging in one agency the authority both to institute and to adjudicate proceedings rests on a simply stated thesis: One who resolves to maintain an action and then serves as an advocate of a particular position is incapacitated to appraise fairly and objectively the arguments advanced against the view espoused.

one at bar) where the effect on commerce is remote, and *disapproval* of the General Counsel's contrary action of asserting jurisdiction in such cases. See *Hearings before the Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., p. 177; S. Rep. No. 99, 81st Cong., 1st Sess., p. 40; S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., p. 8; *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2nd Sess., p. 35; *Hearings before the House Committee on Expenditures in the Executive Departments on H. Res. 512 and H. Res. 516*, 81st Cong., 2nd Sess., p. 109; *Hearings before the Joint Committee on Labor-Management Relations*, 80th Cong., 2nd Sess., p. 45.

³⁷ Gellhorn, *Federal Administrative Proceedings* (Johns Hopkins, 1941), p. 18.

So-called "separation of functions" attempts to overcome this objection by isolating those who perform the characteristic tasks of a prosecutor from those who perform adjudicating functions.

The characteristic tasks of a prosecutor are those of "investigation and advocacy," and of "making preliminary decisions to issue a complaint or to proceed to formal hearing in cases which later the agency heads will decide." *Final Report of the Attorney General's Committee on Administrative Procedure* (Govt. Print. Off., 1941), p. 56. The process of deciding to issue a complaint is (*Id.* at 57):

* * * wholly comparable to what a court does in the first stage of a show cause proceeding, or in the issuance of a writ of certiorari. No decision on the merits is made; the court, or the [prosecuting arm of the agency], merely concludes that the situation warrants further examination in formal proceedings. *The ultimate judgment of the agency heads need be no more influenced by the preliminary authorization to proceed than is the ultimate judgment of a court by the issuance of a temporary restraining order pending a formal hearing for a permanent injunction.* [Emphasis added.]

Thus, to achieve the intent of the amended Act to "separate" the functions of prosecution and adjudication, it is necessary to construe the General Counsel's "final authority" as encompassing only these tasks. This is precisely what the Board has done (p. 25, *supra*) in giving the General Counsel free rein with respect to the investigation of unfair labor practice charges, the determination as to whether a com-

plaint should issue, and the conduct of the prosecution.

If, as petitioner contends, the issuance of a complaint by the General Counsel must, in addition, limit the Board's decisional process (so that it is precluded from dismissing on policy grounds), this result, far from being compelled by the doctrine of separation of functions, is repugnant to the doctrine. The prosecutor's "preliminary authorization to proceed," instead of being a mere conclusion "that the situation warrants further examination in formal proceedings," would influence the result of the formal proceeding. In short, the prosecutory arm, rather than being confined to the characteristic tasks of a prosecutor, would thus be vested with adjudicatory power.

To the extent that petitioner by its separation argument intends to urge, as did the General Counsel before the Board, that Congress went beyond separating functions within an administrative agency—i. e., it transformed the Board into a court—petitioner is on equally fallacious grounds. Essentially this argument reduces to the following syllogism: (1) a court is under a duty to exercise its power in every case brought by the public prosecutor; (2) the amended Act, by creating an independent prosecutor (the General Counsel), leaves the Board with only the judicial power of a court; (3) therefore the Board is under a duty to exercise its power in every case brought by the General Counsel.³⁸

³⁸ Cf. the brief which the General Counsel submitted to the Board in this case. A copy of this brief, which was incorporated in the General Counsel's request for review of the

Assuming *arguendo* that a court cannot decline to exercise its jurisdiction for policy reasons, the assumption implicit in the minor premise—i. e., Congress, by leaving the Board with only adjudicatory power, thereby made it a court—is supported by neither the text nor the legislative history of the amended Act. We have already shown (pp. 22–23, *supra*) that the Board still adjudicates “public” rather than “private” rights, and is still guided by the policies of the Act in fashioning unfair labor practice remedies, in deciding whether to enforce them, and in handling representation cases.³⁹ These are the indicia of an administrative agency rather than of a court (see pp. 35–36, *infra*).⁴⁰

Moreover, Senator Taft, in the comments quoted by petitioner (Br., pp. 19–20), stated that the amendment to the Act by Section 3 (d) :

accomplishes separation of functions *within the framework of the existing agency* * * *.

All that we have done with the Board * * * is to make a separation of powers. *Under this bill the Board is judicial. It is judicial today* [under the Wagner Act] * * *. [Emphasis added.]

Trial Examiner’s dismissal order (R. 21–23), is included in the full transcript of record filed with the Court.

³⁹ As under the original Act, the Board is also vested with rule-making power. See Section 6, and the proviso to Section 8 (a) (2).

⁴⁰ Cf. the distinction drawn by Chairman Herzog between the Board and the Tax Court. *Hearings before the Senate Committee on Expenditures of The Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., p. 141.

This is borne out by Section 3 (a) which provides that: "The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is *hereby continued as an agency of the United States* * * *." [Emphasis added.] Similarly, Section 3 (d) establishes a "General Counsel of the Board," and confers upon him "final authority, on behalf of the Board."⁴¹

In the face of this evidence, it is apparent that the amended Act, rather than changing the fundamental nature of the agency, retains its status as an administrative body, combining within its framework prosecuting and adjudicatory functions which are now performed in isolation from each other. Whereas before, in the handling of unfair labor practice cases, the National Labor Relations Board was an administrative agency with both prosecuting and adjudicatory functions lodged in the Board members, it is now one in which only the latter functions are vested in the Board members. The Board members, in the performance of their present functions in unfair labor practice cases, act in a "quasijudicial" capacity just as they did in performing these same functions under the Wagner Act (see pp. 12, 16-17, *supra*). For these reasons, the Hoover Commission has grouped the National Labor Relations Board, along with the Federal Trade Commission, as an "independent regulatory commission."⁴²

⁴¹ Cf. the recent amendments to the *Memorandum Describing Statutory and Delegated Functions of the General Counsel*, 15 F. R. 1088-1090.

⁴² *Task Force Report on Regulatory Commissions* [Appendix N], prepared for the Commission on Organization of the Executive Branch of the Government (Govt. Print. Off., 1949),

There is a significant difference between a court and an administrative agency with "quasi-judicial" power. This difference has been articulated as follows:⁴³

[Administrative agencies] do more than judicially and impartially apply the law as they find it to a controversy between private parties; they are charged with the carrying out of definite policies involving discretion and the formulation of subordinate policies to effectuate the purpose of the laws which they administer. The courts, on the other hand, take the law as they find it without any particular obligation to accomplish a particular public purpose or secure a certain result. Administrative bodies are policy-determining and policy-effectuating bodies, while the courts merely construe and apply the laws.

Similarly, the Hoover Commission noted that:⁴⁴

* * * each of the commissions is largely engaged in making policies and defining standards of conduct within the framework of the statute. In great part, this is carried on through quasi-judicial procedures, but it *involves more than adjudications of a court*. In making decisions or regulations defining a

pp. 3, 10-11. Senator Taft, in his comments on Reorganization Plan No. 12, also described the National Labor Relation Board as a "regulatory commission," adding: "Its function is not so much the trial of cases; it does not depend so much on a lot of facts disputed vigorously on both sides; it depends rather on an *administrative study* of the entire problem" (emphasis added). 96 Cong. Rec. 6963 (May 11, 1950).

⁴³ Pillsbury, "Administrative Tribunals," 36 Harv. L. Rev. 405, 423.

⁴⁴ *Task Force Report on Regulatory Commissions*, op. cit., p. 11.

standard of conduct, prescribing a duty, or granting a privilege, *the commission must act in the light of the conditions in the industry and the statutory objectives.* [Emphasis added.]⁴⁵

The rationale for the distinction is that courts, unlike administrative agencies, are usually provided with no standard for selecting on policy grounds between those rights which they should, and should not, enforce.⁴⁶ In Section 1 of the Act (p. 37, *infra*), on the other hand, Congress provided the Board with standards for making that precise selection.

To sum up: The separation of functions effected by Congress in the amended Act did not destroy the Board's status as an administrative agency. Discretionary authority to effectuate "the policy of a public statute is the hallmark of the administrative process, [and] is [the] very characteristic which distinguishes an administrative agency from a court of law" (R. 29). Consequently, judicial analogies are inapposite and do not in any way impair the correctness of the conclusion that the Board has power to dismiss unfair labor practice complaints for policy reasons.

⁴⁵ See also, Chamberlain, *The Judicial Function in Federal Administrative Agencies* (The Commonwealth Fund, 1942), p. 55; *Report of the Committee on Ministers' Powers* (1932, Cmd. 4060), quoted in Stason, *Cases and Other Materials on Administrative Tribunals* (Callaghan, 1947), pp. 64, 68; Davis, *Official Notice*, 62 Harv. L. Rev. 537, 538, 549.

⁴⁶ Where, however, there is a "recognized public policy or defined principle guiding the exercise of the jurisdiction conferred" which would warrant its nonexercise, even a court may decline to assert its jurisdiction. *Meredith v. Winter Haven*, 320 U. S. 228, 234-235. And cf. 28 U. S. C. A. Sec. 1254, defining the discretionary certiorari jurisdiction of the Supreme Court. Accordingly, the major premise of the syllogism (p. 32, *supra*) is likewise invalid.

3. *The interrelation between unfair labor practice and representation proceedings*

Consideration of the interrelation between unfair labor practice and representation proceedings furnishes additional evidence that Congress, in amending the Act, could not have intended to deprive the Board of discretionary authority to dismiss a complaint for policy reasons.

A representation proceeding under Section 9 of the Act and an unfair labor practice proceeding under Section 10 are complementary tools given to the Board for the effectuation of the purposes of the Act. Thus the preamble to the statute, in reciting these purposes, states (Section 1, last paragraph):

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedures of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
[Emphasis added.]

The unity between the two types of proceedings is further shown by the fact that it is an unfair labor practice under Section 8 (a) (5) for an employer to refuse to bargain collectively with the majority representative determined under Section 9. In this situation, "the unit proceeding and [the] complaint

on unfair labor practices⁴ are really one.” *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 158. Accordingly, Section 9 (d) provides that, where the Board’s determination in a representation proceeding forms the basis of a final order entered in an unfair labor practice proceeding, both determinations shall be judicially reviewed at the same time. See *A. F. of L. v. N. L. R. B.*, 308 U. S. 401.

Petitioner does not question that under the amended Act, as under the old Act, the Board is empowered to dismiss representation petitions on policy grounds.⁴⁷ Indeed, it assumes the propriety of the Board’s action in the prior representation case involving Haleston, wherein the Board dismissed the representation petition for the very same policy reason assigned in the instant complaint proceeding. In view of the above-described interrelation between complaint and representation proceedings, anomalous results, obviously not intended by Congress, would occur if the amended Act, while leaving the Board power to dismiss a representation petition for policy reasons, at the same time took from it the complementary power to dismiss a complaint for identical reasons.

For example, the Board’s authority under Section 9 to determine questions concerning representation may be invoked either by a petition filed pursuant to that section or by a complaint alleging refusal to bar-

⁴⁷ See *Packard Motor Car Co. v. N. L. R. B.*, 330 U. S. 485, 492-493; *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 770; *S. & R. Baking Co.*, 65 N. L. R. B. 351; *Hom-Ond Food Stores, Inc.*, 77 N. L. R. B. 647; *N. L. R. B., Twelfth Annual Report* (Govt. Print. Off., 1948), pp. 7-14.

gain under Section 8 (a) (5) or 8 (b) (3).⁴⁸ If the Board may exercise its discretion to dismiss the representation petition but not to dismiss the complaint, this dilemma is presented: Either the discretion conceded to exist with respect to representation petitions is illusory, or the parties are made subject to the liabilities of the Act without necessarily being entitled to resort to its peaceful procedures whereby the unfair labor practices alleged in the complaint might have been avoided. It is inconceivable that Congress intended so manifest an inequity,⁴⁹ or that it sought to permit such divergent results to turn on the nature of the proceeding to determine the bargaining representative.

Similarly, such inequity would be present in the instant case if the Board were without power to dismiss the complaint on policy grounds. The complaint here alleged (R. 5-11) that, by insisting upon a union-shop provision not authorized under Section 9 (e) of the Act, the Union was engaging in an unfair labor practice within the meaning of Section 8 (b) (2). But, since the Board presumably has the same discretion with respect to Section 9 (e) petitions for

⁴⁸ Section 8 (a) (5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9 (a)*. Section 8 (b) (3) provides that it shall be an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, *provided it is the representative of his employees subject to the provisions of section 9 (a)*." [Emphasis added.]

⁴⁹ Where, for strong policy reasons, Congress has intended parties to be subject to the liabilities of the Act without being entitled to invoke its protection, it has stated that intention in unmistakable terms—Sections 9 (f), (g) and (h) of the amended Act as compared with the subdivisions of Section 8 (b).

union-shop elections as it has with respect to Section 9 (c) petitions for representation elections, it would have refused to entertain the union's petition under Section 9 (e) for the same policy reason as it dismissed the prior representation petition.^{49a} Accordingly, unless the Board had power to complement its dismissal of the representation petition with an equivalent dismissal of the complaint, the Union would be subject to the liabilities of the Act without being accorded the opportunity, provided in Section 9 (e), of avoiding them.⁵⁰

Again, certification of a union as collective bargaining representative of employees operates to insulate that union against certain types of unfair labor practice charges and to create liabilities in rival unions for adopting certain forms of economic pressure against it.⁵¹ The power to dismiss a petition for certification on policy grounds, unaccompanied by the

^{49a} See *Construction Materials Co.*, 14-UA-3074. The formal file of this case records the fact that, on October 28, 1949, the Board sustained the Regional Director, who had dismissed the union shop election petition on the ground that the Board had, in a prior representation case involving the same company (14-RC-577, 85 N. L. R. B., No. 63), declined jurisdiction for policy reasons.

⁵⁰ A similar incongruity is presented by an 8 (b) (2) charge involving labor organizations in the building construction industry, where, because of unstable employment relations, there is no suitable administrative machinery for conducting Section 9 (e) union shop elections. The General Counsel has attempted to forestall this incongruity by doing the very thing which both he and petitioner would preclude the Board from doing in the instant case—i. e., he has declined, for policy reasons, to issue complaints based on 8 (b) (2) charges arising in the building and construction industry. See 25 L. R. R. M. 107-109 (December 26, 1949).

⁵¹ See *General Box Co.*, 82 N. L. R. B. 678, 680-682.

equivalent power in respect to complaints, would discriminate against a union whose petition had been so dismissed. Through no fault of its own, this union, unlike another union which was successful in obtaining certification, could not engage in secondary pressure to compel recognition without running the risk of incurring a sanction for violating Section 8 (b) (4) (B) of the Act.

Apart from the anomalies already described, a further absurdity would occur if the Board were without power to dismiss a complaint for policy reasons. The Board, although it has a valid policy for not proceeding, would have to go to the expense and time of deciding the case on the merits and issuing an order. Then it could render all this futile, and give effect to its original policy, by refusing to seek enforcement of the order. Under the amended Act, as under the Wagner Act, the permissive language of Section 10 (e) vests the Board with complete discretion to determine whether to initiate enforcement proceedings (see pp. 10-11, 21-22, *supra*).

4. *The Electrical Workers case*

The recent decision of the Second Circuit, in *Int'l Bro. of Electrical Workers v. N. L. R. B.*,⁵² corroborates the overwhelming evidence thus far presented by expressly recognizing that, under the amended Act, the Board has power to dismiss a complaint for the reason that the activities involved have only a remote effect on commerce. In that case, the Board had found that the union, by picketing a building site where both union and nonunion subcontractors were working, vio-

⁵² 181 F. 2d 34 (February 24, 1950).

lated Section 8 (b) (4) (A) of the Act. The union, in defending against the Board's order, argued that (181 F. 2d at 36) "even though the Board had jurisdiction in the sense that [the union's] act 'affected' commerce, the occasion was too trivial to justify intervention, * * *." ⁵³ Judge Learned Hand, speaking for the Court, rejected this contention on the ground that it was for the Board, not the courts, to decide whether a "situation" was important enough to warrant its intervention. He added that, if a court had power to set aside such a Board determination, it could do so only when the Board had been "frivolous beyond rational question" (see pp. 52-53, *infra*), which was not true here.

The holding of Judge Hand necessarily presupposes that the Board, under the amended Act, has power to dismiss an unfair labor practice complaint for the reason that the business involved does not significantly affect commerce. Otherwise, the short answer to the union's contention in the *Electrical Workers* case would have been that the Board lacked authority to decline jurisdiction on the ground proposed. That is, unless the Board possessed the authority in question, it would have been pointless to suggest, as Judge Hand did, that, if the Board's assertion of jurisdiction was "frivolous beyond rational question," the court could have set it aside. Similarly, there would have been no need to review the Board's determination, as

⁵³ It is clear that this argument was addressed to the *Board's* action in affirming the General Counsel's assertion of jurisdiction, rather than to the General Counsel's action in initiating the proceeding.

Judge Hand proceeded to do, and conclude that "the case at bar was certainly within the area of fair differences of opinion, which we must not invade" (181 F. 2d at 36).⁵⁴

POINT II

The Board's conclusion that petitioner's business bears only a remote and insubstantial relation to commerce is not subject to judicial review

We submit that, were this Court to conclude, as we have shown (pp. 9-43, *supra*), that the Board had statutory authority to make the policy judgment here involved, judicial review should thereupon end. The further question of whether the Board was reasonable, in deciding upon the facts of this case that petitioner's business was too unimportant in relation to interstate commerce to warrant the assertion of jurisdiction, lacks "satisfactory criteria for a judicial determination" (*Coleman v. Miller*, 307 U. S. 433, 454-455), and is therefore not a proper subject for court scrutiny.

It is no longer disputed that the Act confers upon the Board a "vast range of jurisdiction," which encompasses "untold small enterprises." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 782-783.⁵⁵ Accordingly, the courts, including this Court, have sustained Board orders

⁵⁴ Cf. *N. L. R. B. v. Fulton Bag & Cotton Mills*, 180 F. 2d 68 (C. A. 10, January 3, 1950).

⁵⁵ See also, *N. L. R. B. v. Fainblatt*, 306 U. S. 601; *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318; *Polish Nat'l Alliance v. N. L. R. B.*, 332 U. S. 643, 648.

directed to retail businesses and other operations which "in isolation might be viewed to be merely local" (*Ibid.*).⁵⁶

Such "vast range of jurisdiction," however, raises practical problems of budget and administration. Through the years the Board has, in any one period, received many more cases than it and its limited staff have been able to dispose of, with the result that a huge backlog of undecided cases has been built up.⁵⁷ This condition has, from time to time, been aggravated by Congressionally imposed, drastic cuts in Board appropriations.⁵⁸ Even at the end of the 1948-1949 fiscal year, a period in which the Board closed a tremendous

⁵⁶ *N. L. R. B. v. Van DeKamp's Holland-Dutch Bakers, Inc.*, 152 F. 2d 818, 819 (C. A. 9); *Brandeis & Sons v. N. L. R. B.*, 142 F. 2d 977, 981 (C. A. 8); *N. L. R. B. v. Suburban Lumber Co.*, 121 F. 2d 829, 832-833 (C. A. 3); *N. L. R. B. v. Schmidt Baking Co., Inc.*, 122 F. 2d 162, 163 (C. A. 4). *United Bro. v. Sperry*, 170 F. 2d 863 (C. A. 10); *Int'l Bro. v. N. L. R. B.*, 181 F. 2d 34 (C. A. 2, February 24, 1950).

⁵⁷ *N. L. R. B. Twelfth Annual Report* (Govt. Print. Off., 1948), Table 1, p. 83; *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 783.

⁵⁸ Thus, in its *Eleventh Annual Report* (Govt. Print. Off., 1947) the Board noted (p. 6):

"At the close of the fiscal year ending June 30, 1946, 4,605 cases were still pending before the Board, * * *. Never before in its history did the Board enter a new fiscal year with so great a backlog. * * *. In view of the dynamic nature of the field in which the Board operates, it is of prime importance to both employers and employees that such cases be considered and adjudicated as rapidly as possible, * * *. Considered in this connection, a matter of grave concern to the Board is the deep cut made in its appropriations for the fiscal year beginning July 1, 1946, which necessitated the separation of over 20 percent of its personnel."

total of 32,796 cases, a backlog of 5,722 cases remained on the docket.⁵⁹

If the Board were to assert jurisdiction over every local business nominally covered by the Act, it would do so at the expense of delaying action in other cases with a far greater impact on commerce, which compete for the same limited budget and staff. To utilize these fixed resources in the manner which will best effectuate the policies of the Act, the Board, therefore, cannot exercise the full measure of its legal jurisdiction, but must differentiate between cases it will entertain on the basis of the size and type of business involved and the impact on commerce.⁶⁰ In general, jurisdiction is asserted in those cases which, in relation to the entire case-load, present the most serious threat to commerce, while it is withheld in those where that threat is least severe. Because both case-load and budget vary from time to time, however, cases which, at one period, warrant an assertion of jurisdiction may not warrant it at another periods, and *vice versa*.

In short where, as here, the question of whether the assertion of jurisdiction would effectuate the policies of the Act turns solely on the relation of the business to commerce,⁶¹ resolution of that question involves a

⁵⁹ *Fourteenth Annual Report* (Govt. Print. Off., 1950), p. 1.

⁶⁰ Cf. *U. S. v. Morton Salt Co.*, 338 U. S. 632, 647-648; *Task Force Report on Regularity Commissions* [Appendix N], prepared for the Commission on Organization of the Executive Branch of the Government (Govt. Print. Off., 1949), p. 41.

⁶¹ The cases cited pp. 12-14, 15, n. 19, 26, n. 33, *supra*, reveal that this question may turn on other considerations.

determination as to what constitutes the best allocation of the Board's funds and personnel. This is illustrated by Chairman Herzog's statement in the *Liddon White* case,⁶² where, in dissenting from the majority's assertion of jurisdiction over a retail automobile dealer, he warned (at 1185):

An agency that received 12,500 new cases in the most recent 6-month period and closed its books on March 1 with 9,500 cases pending ought not, * * * to embark upon a search for new fields to conquer. There is more than enough to do. We believe that it would be better for the Board to concentrate attention upon expediting action on cases in important industries, rather than dissipate its energies upon matters that would normally be the concern of the States. * * *

Similarly in his recent testimony on Reorganization Plan No. 12, Chairman Herzog stated:⁶³

The present General Counsel insists that this agency should seek to regulate the labor relations of any and every enterprise whose activities affect interstate commerce in the constitutional sense, no matter how remotely. * * *

The Board members, on the other hand, have declined to reach out to take most such operations on the ground that they are essentially local in character * * *. *The Board believes that budgetary limitations, as well as the need to avoid diffusion of its time and energy,*

⁶² *Liddon White Trucks Co., Inc.*, 76 N. L. R. B. 1181.

⁶³ *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2nd Sess., p. 120.

*justify it in not exerting its jurisdictional authority up to the legal hilt. * * ** [Emphasis added.]⁶⁴

That allocation of funds and personnel is involved is further illustrated by the fact that hotel and restaurant officials, who were opposed to General Counsel Denham's policy of asserting jurisdiction over essentially local businesses, lodged their objection with the House Committee on *Expenditures in the Executive Departments*, and in the course of its hearing the following colloquy occurred between Congressman Gwinn and the General Counsel: 151

MR. GWINN. Now, you have a certain amount of confusion that is pretty apparent here. Would it not be sensible to continue the same rulings that have been applied until we have time to redefine what commerce is and what affects commerce?

MR. DENHAM. My job is to take the law as it is written and apply it as I understand it to be.

MR. GWINN. You will never be able to apply it; *you will not have enough machinery to do it. Congress will have to meet in extra session to give you more appropriations, more personnel.* [Emphasis added.]

It is well settled that it "is not the function of [a] court to inquire into the propriety of expenditures by the National Labor Relations Board of funds ap-

⁶⁴ See also Chairman Herzog's dissent in *Jacob Schneider Pattern Works*, 64 N. L. R. B. 787, 790, and his testimony before the Joint Committee on Labor Management Relations. *Hearings before the Joint Committee on Labor Management Relations*, 80th Cong., 2nd Sess., Part 2, pp. 1120-1121, 1148-1149.

⁶⁵ A transcript of this hearing is contained in *Hearings before the Joint Committee on Labor-Management Relations*, *supra*, Part 1, pp. 11-41. The colloquy occurs *Id.*, at 29.

propriated to its use by the Congress.” *N. L. R. B. v. Nat’l Tool Co.*, 139 F. 2d 490 (C. A. 6).⁶⁶ The reason for this holding is, in part, Congress’ intention that the use of appropriations be subject to legislative rather than judicial control. Such intention has been manifested by the creation of the General Accounting Office, with provision for reports by the Comptroller General to Congress respecting every expenditure or contract made by any department or agency in violation of law.⁶⁷

An equally compelling reason for judicial abnegation is that, as the courts have themselves recognized, agency financial matters, like political questions and the conduct of foreign affairs,⁶⁸ involve considerations as to “which the judiciary has neither aptitude, facilities nor responsibility * * *.” *C. & S. Air Lines* case, 333 U. S. at 111. Decisions respecting such matters, lacking “satisfactory criteria for a judicial determination” (*Coleman v. Miller*, 307 U. S. at 454–455), are not judicial but “essentially legislative or

⁶⁶ See also, *N. L. R. B. v. Thompson Products*, 141 F. 2d 794, 797–799 (C. A. 9); *N. L. R. B. v. Elvine Knitting Mills, Inc.*, 138 F. 2d 633, 634 (C. A. 2); *S. H. Camp & Co. v. N. L. R. B.*, 160 F. 2d 519, 521 (C. A. 6). This rule necessarily applies to nonexpenditures as well, because the question of whether it was proper not to use funds for a particular purpose can usually be answered only after inquiry into the relative merits of the alternative purposes for which these funds were spent.

⁶⁷ *Budget and Accounting Act*, 1921, Sec. 312 (c) (42 Stat. 20, 31 U. S. C. Secs. 71 *et seq.*). See also, *Task Force Report on Regulatory Commissions* [Appendix N], *op. cit.*, pp. 15–16, 37.

⁶⁸ *Coleman v. Miller*, 307 U. S. 433, 454–456, and cases cited therein; *C. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U. S. 103, 111–112. Cf. *Perkins v. Lukins Steel Co.*, 310 U. S. 113, 127–28.

administrative.” *Fed’l Radio Commn. v. Gen’l Electric Co.*, 281 U. S. 464, 469. The requirement of “case or controversy” in Article III of the Constitution, as well as due regard for the doctrine of separation of powers, thus preclude “constitutional courts” from entering this realm.⁶⁹

The exercise of the Board’s discretion in the instant case, being intimately entwined with the question of how the Board is to use its funds and personnel, it follows that the Board’s decision is not cognizable by this Court. Cf. *Int’l Bro. of Electrical Workers v. N. L. R. B.*, 181 F. 2d 34, 36 (C. A. 2, February 24, 1950). If any review is to be made, it is exclusively within the province of the legislative branch to exercise such function.⁷⁰

POINT III

In any event, there is rational basis for the Board’s declination of jurisdiction over petitioner’s business

The Board’s conclusion that petitioner’s operations were essentially local, and therefore only remotely affected commerce, was based on the facts that “the Employer operates a chain of retail drug stores in Portland, Oregon, making substantial out-of-State purchases but selling all its merchandise locally” (R. 25). The Board added (R. 26): “Retail drug

⁶⁹ See *Keller v. Potomac Electric Power Co.*, 261 U. S. 428; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693; *Fed’l Radio Commn. v. Gen’l Electric Co.*, 281 U. S. 464.

⁷⁰ That Congress approves of the Board’s refusal to use its funds in cases like the instant one, where the effect on commerce is remote, see n. 36, pp. 29–30, *supra*.

stores are essentially local operations, and in such cases we have frequently declined to assert jurisdiction where the only factor in favor of doing so was a substantial volume of out-of-State purchases.”

There can be little question that a retail store or a chain of retail stores, wholly confined to one State and selling all of its merchandise locally, falls in the category of an “essentially local operation.”⁷¹ It is equally clear that a stoppage of such store’s business by a labor dispute may have a varying impact on interstate commerce. For example, the impact would be least where the store made no out-of-State purchases, obtaining all of its supplies locally; greater where the store received supplies from out-of-State; and greatest where out-of-State purchases were coupled with local sales to industrial concerns, themselves directly engaged in commerce.

With respect to the local retail stores described, the Board has concluded that, at the present time, it can, consistent with the demands of other industries, assert jurisdiction only in those cases which present the greatest threat to interstate commerce. Accordingly,

⁷¹ Thus, under the compact which the National Labor Relations Board entered into with the New York State Labor Relations Board (set forth in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 795), it was agreed that:

“Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, * * *:

1. Retail stores,

* * *

8. Other obviously local businesses.”

not only in cases involving retail drug stores,⁷² but in those involving retail bakery, dairy, and clothing stores,⁷³ the Board has refused jurisdiction where, as here, the immediate pinch on interstate commerce would be solely the stoppage of out-of-State purchases. On the other hand, the Board has asserted jurisdiction where this factor, in combination with additional factors, would render the interference with commerce more severe.⁷⁴

⁷² In addition to the instant case, see *Jacobs Pharmacy, Inc.*, 87 N. L. R. B. No. 34, 25 L. R. R. M. 1101; *Caneer v. Retail Clerks Assn.*, 25 L. R. R. M. 2404 (Cal. Superior Ct., January 31, 1950).

⁷³ E. g., *Sta-Kleen Bakery, Inc.*, 78 N. L. R. B. 798; *Fehr Baking Co.*, 79 N. L. R. B. 440; *Purity Creamery Co.*, 79 N. L. R. B. 1042; *Creamland Dairy, Inc.*, 80 N. L. R. B. 106; *Bailey Slipper Shop, Inc.*, 84 N. L. R. B. No. 41, 24 L. R. R. M. 1260 (June 17, 1948); *Squires, Inc.*, 88 N. L. R. B. No. 2, 25 L. R. R. M. 1280 (January 6, 1950); *Morris C. Lebowitz d/b/a Joseph's*, 88 N. L. R. B. No. 3, 25 L. R. R. M. 1279 (January 6, 1950); *Ann Francis Millman d/b/a Fashion Fair Shops*, 88 N. L. R. B. No. 264, 25 L. R. R. M. 1525 (March 29, 1950).

⁷⁴ E. g., *Sun Ray Drug Co.*, 87 N. L. R. B. No. 32, 25 L. R. R. M. 1101, November 22, 1949 (stores part of a multi-state chain); *Collins Baking Co.*, 83 N. L. R. B. No. 88, 23 L. R. R. M. 1104, May 13, 1949 (stores affiliated with a company controlling other bakeries in numerous States); *Indianapolis Cleaners*, 87 N. L. R. B. No. 75, 25 L. R. R. M. 1141, December 8, 1949 (substantial services to customers engaged in interstate commerce); *Panaderia Sucesion Alonso*, 87 N. L. R. B. No. 108, 25 L. R. R. M. 1146, December, 1949 (Puerto Rican bakery).

The automobile dealer cases cited by petitioner (Br., p. 11) fall in this category. There the additional factor, which has prompted the assertion of jurisdiction, is the fact that the retail dealer is part of a nation-wide franchise system of distribution. See *N. L. R. B. v. Townsend*, No. 12362 in this Court. In any event, it does not follow that, because the Board has asserted jurisdiction over retail automobile dealers, it is arbitrary

Insofar as the retail drug industry is concerned, any other course would make it virtually impossible for the Board to limit the number of drug store cases which it will entertain. Statistics concerning the purchasing habits of retail drug chains—both those which, like petitioner, are wholly in one state, and those which are multistate—reveal that they procure the bulk of their supplies directly from manufacturers.⁷⁵ Since the drug manufacturing industry is concentrated in a relatively few parts of the country,⁷⁶ it follows that almost every retail drug chain makes out-of-State purchases. Consequently, if, as is presently true, the Board is unable to handle every case involving retail drug chains, and must therefore differentiate among them on the basis of their impact on commerce, it is necessarily required to employ criteria other than out-of-State purchases.

If the propriety of the Board's declination of jurisdiction in this case is reviewable (cf. pp. 43-49, *supra*), the standard applicable is that suggested by Judge Learned Hand in *Int'l Bro. of Electrical Workers v. N. L. R. B.*⁷⁷ There, in passing upon the union's contention that, because of the local nature of the business involved, the Board abused its discretion

in declining jurisdiction over retail drug stores. Cf. *Virginian Ry. v. U. S.*, 272 U. S. 658, 665-666; *Curran v. Wallace*, 306 U. S. 1, 14.

⁷⁵ See *Sources of Chain-Store Merchandise*, S. Doc. No. 30, 72d Cong., 1st Sess., p. 12, Table 4.

⁷⁶ See *Report of the Drug, Medicine and Toilet Preparations Industry*, prepared for Industry Committee No. 19 (U. S. Dept. of Labor, Wage & Hour Division, January 1941) p. 9, Table 4.

⁷⁷ 181 F. 2d 34 (C. A. 2, February 24, 1950), discussed pp. 41-43, *supra*.

in asserting jurisdiction, Judge Hand stated (181 F. 2d at 36):

We should hesitate to say that we could have power ever to review the Board's action because we thought the situation was unimportant; but we need not now decide more than that, *if there may be such situations, they must be frivolous beyond rational question*, and that the case at bar was certainly within the area of fair differences of opinion, which we must not invade. [Italics added.]

In the light of the considerations set forth above, clearly the Board, in declining jurisdiction over petitioner's operation, was not "frivolous beyond rational question." Moreover, the decision reached by the Board was "certainly within the area of fair differences of opinion." Accordingly, this Court may not substitute its judgment for that of the Board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the relief requested by petitioner be denied.

IDA KLAUS,

Solicitor.

NORTON J. COME,

Attorney,

National Labor Relations Board.

JUNE 1950.

APPENDIX

The revelant provisions of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C. Secs. 151, *et seq.*), and of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 141, *et seq.*), are as follows:

Key to Comparison

Portions of the National Labor Relations Act which have been eliminated by the Labor Management Relations Act are enclosed in black brackets; provisions which have been added to the National Labor Relations Act are in italics; and unchanged portions of the National Labor Relations Act are shown in roman.

NATIONAL LABOR RELATIONS ACT

[AN ACT]

[To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.]

FINDINGS AND POLICIES

SECTION 1. The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strike or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * *

(10) The term "National Labor Relations Board" means the National Labor Relations Board [created by] *provided for in* section 3 of this Act.

* * * * *

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) [There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except] *The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President, by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.*

(b) *The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and [two] three members of the Board shall, at all times, constitute a quorum [.] of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.*

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) *There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other*

duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) Each member of the Board *and the General Counsel of the Board* shall receive a salary of **[\$10,000]** *\$12,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint **[without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended,]** an executive secretary, and such attorneys, examiners, and regional directors, and **[shall appoint]** such other employees **[with regard to existing laws applicable to the employment and compensation of officers and employees of the United States,]** as it may from time to time find necessary for the proper performance of its duties. **[and as may be from time to time appropriated for by Congress.]** *The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, [(or for statistical work), where such service may be obtained from the Department of Labor,] or for economic analysis.*

* * * * *

SEC. 6. **[(a)]** The Board shall have authority from time to time to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this Act. **[Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.]**

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, [(a)] an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in [the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712, as amended from time to time, or in any code or agreement approved or prescribed thereunder,] any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later*, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work; Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer [.] and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to [insure] assure to employees the [full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act,] fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if

such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) **[**Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.**]**

(1) whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under **[sub] section [s] 10 (e) or 10 (f)**, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the

employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power [shall be exclusive, and] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, [code,] law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.* Any such complaint may

be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. [In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.] *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).*

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon [all] *the preponderance* of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.* Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon [all] *the preponderance* of the testimony taken the Board shall *not* be of the opinion that *the* [no] person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended*

order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the *United States Court of Appeals [of] for the District of Columbia*), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the *[Supreme] District Court of the United States for the District of Columbia*), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board *[as to the facts,] with respect to questions of fact* if supported by *substantial evidence[,] on the record considered as a whole* shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings and to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which *[,] findings with respect to questions of fact* if supported by *substantial evidence, on the record considered as a whole* shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be

exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the *United States* Court of Appeals [of] for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; [and] the findings of the Board [as to the facts,] *with respect to questions of fact* if supported by *substantial evidence* [,] *on the record considered as a whole* shall in like manner be conclusive.

No. 12414

United States
Court of Appeals
for the Ninth Circuit.

PHIL DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Northern Division.

FILED

MAR 9 - 1950

PAUL P. O'BRIEN,
CLERK

No. 12414

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES OF ATTORNEYS OF RECORD

LEO A. SULLIVAN, ESQ.,
CLIFTON HILDEBRAND, ESQ.,
Attorneys for Appellant.

HARLAN M. THOMPSON, ESQ.,
Attorneys for Appellee.

In the Northern Division of the United States District Court for the Northern District of California.

Cr. No. 10290

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PHIL DAVIS,

Defendant.

INFORMATION

(T. 46 USCA, 526 l, 526 m—Reckless and negligent operation of motor boat.)

The United States Attorney charges: That Phil Davis on or about the 27th day of June, 1949, at Lake Tahoe, and while operating a motor boat, to-wit: a speed boat, on the waters of the said Lake Tahoe, in the County of Eldorado, in the Northern Division of the Northern District of California, and within the jurisdiction of this Court then and there being, said Lake Tahoe then and there being a navigable body of water under the jurisdiction of the United States Government, did then and there unlawfully, wilfully and knowingly operate said motor boat in a reckless and negligent manner thereby endangering the life and limb of one Imogene Wittsche and one Janet Lutz.

FRANK J. HENNESSY,
United States Attorney.

By /s/ HARLAN M. THOMPSON,
Ass't U. S. Attorney.

[Endorsed]: Filed July 11, 1949.

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO DISMISS
INFORMATION

The defendant moves that the Information be dismissed on the following grounds:

1. The court is without jurisdiction because the offense, if any, is not cognizable in federal courts under federal law.

2. The court is without jurisdiction because the place of the alleged offense, to-wit, Lake Tahoe, is not a navigable body of water under the jurisdiction of the United States Government.

[Endorsed]: Filed August 2, 1949.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday, the 2nd day of August, in the year of our Lord one thousand nine hundred and 49.

Present: The Honorable Dal M. Lemmon,
District Judge.

[Title of Cause.]

Plea. Defendant present with Leo A. Sullivan, his attorney. H. L. Thompson, Asst. U. S. Attorney, present for the U. S. Mr. Sullivan pre-

sented and filed motion to dismiss After hearing Mr. Sullivan and Mr. Thompson, Ordered motion denied. Defendant plead Not Guilt to Information. Ordered case continued to Sept. 27, 1949, for trial. Defendant demanded trial by jury.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Phil Davis, the defendant at the bar, guilty.

/s/ GEO. M. ANDERSON,
Foreman.

[Endorsed]: Filed October 24, 1949.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL

To the People of the United States and to the United States Attorney for the Northern District of California:

You and each of you will please take notice that the defendant intends to move the above-entitled Court to vacate and set aside the verdict rendered in the above-entitled action, and to grant a new trial of said cause upon the following grounds

materially affecting the substantial rights of said defendant, to-wit:

1. Insufficiency of the evidence to justify the verdict, to-wit: Taken as a whole the evidence was insufficient as a matter of law for the jury to find the defendant guilty as charged.

2. Taken as a whole the evidence was insufficient as a matter of law for the jury to find the defendant guilty of any intent to commit any act charged.

3. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made and based upon the records and files in the above-entitled action and upon the minutes of the court.

Dated: November 7th, 1949.

/s/ LEO A. SULLIVAN,

Attorney for Defendant.

[Endorsed]: Filed November 7, 1949.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and 49.

Present: The Honorable Dal M. Lemmon,
District Judge.

UNITED STATES,

vs.

PHIL DAVIS.

No. 10290

JUDGMENT

Defendant present in Court with Leo A. Sullivan, his Attorney. Harlan M. Thompson, Asst. U. S. Attorney, present for the U. S. Motion for new trial and motion for probation denied. Sentence: Six months and fine of \$1500.00. Motion for bail taken under advisement. Ordered *state* of execution granted until Nov. 13th, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the defendant, Phil Davis, and files his Notice of Appeal, hereby giving notice that he appeals to the Ninth Circuit Court of the United States from the Judgment rendered by the Court after a verdict of guilty, and from the Order of

the Court denying this defendant a Motion for a New Trial, and from each and every appealable order made before and after Judgment.

Dated: November 7th, 1949.

/s/ LEO A. SULLIVAN,
Attorney for Defendant.

[Endorsed]: Filed November 7, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Defendant, Phil Davis, respectfully *applies the* above-entitled Court for an order directing the phonographic reporter to transcribe all the testimony introduced in the trial of said action, and all objections to questions propounded and rulings thereon, and the entire record of said trial.

The grounds for appeal and the points upon which appellant relies are as follows:

That the Court erred in decisions of questions of law arising during the course of the trial.

That the verdict is contrary to law and evidence.

That in order to present all of the points and grounds relied upon by appellant upon the appeal herein, it will be necessary to have the entire record of said trial above referred to.

Dated: Nov. 7th, 1949.

/s/ LEO A. SULLIVAN,
Attorney for Defendant.

[Endorsed]: Filed November 7, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL REQUEST FOR RECORD

Defendant, Phil Davis, respectfully applies to the above entitled Court for an order directing the Clerk of said Court to transcribe all motions, rulings, and reports, testimony of witnesses, instructions by the Court to the jury, verdict of the jury, all proceedings had upon motion for new trial and all proceedings had upon motion for dismissal prior to the time of trial.

Defendant further applies for an order directing the Clerk of this Court to prepare the regular clerk's record containing all pleadings, motions, and rulings by the Court upon said motions, and that they be transmitted forthwith to the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ CLIFTON HILDEBRAND,
Attorney for Defendant.

Affidavit of mailing attached.

[Endorsed]: Filed December 12, 1949.

[Title of District Court and Cause.]

GOVERNMENT'S DESIGNATION OF RECORD ON APPEAL

The Government respectfully applies to the above entitled Court for an order directing the Clerk of said Court to include as a portion of the record on appeal the complete transcript of all testimony,

motions, rulings and all other proceedings requested by the defendant, as well as including all exhibits introduced both on behalf of the Government and the defendant at the time of the trial; and that said record setting forth the above matters as well as the exhibits referred to be transmitted forthwith to the United States Circuit Court of Appeals for the Ninth Circuit.

FRANK J. HENNESSY,
United States Attorney.

By /s/ HARLAN M. THOMPSON,
Assistant U. S. Attorney.

[Endorsed]: Filed December 14, 1949.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor, It Is Hereby Ordered that defendant shall have to and until the 17th day of January, 1950 in which to docket appeal of the above entitled matter with the Clerk of the United States Circuit Court of Appeals.

/s/ DAL M. LEMMON,
Judge.

[Endorsed]: Filed December 14, 1949.

In the District Court of the United States for the
Northern District of California, Northern Division.

No. 10290

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PHIL DAVIS,

Defendant.

Before: Hon. Dal M. Lemmon,
Judge.

REPORTER'S TRANSCRIPT

Tuesday, October 18, 1949.

Appearances:

For the Plaintiff:

HARLAN THOMPSON, ESQ.,
Assistant United States Attorney.

For the Defendant:

LEO SULLIVAN, ESQ.

F. W. BRENZEL

called for the Government, sworn.

The Clerk: Will you give the court and jury
your name, please?

The Witness: F. W. Brenzel.

The Clerk: How do you spell the last name?

The Witness: (Spelling) B-r-e-n-z-e-l.

(Testimony of F. W. Brenzel.)

Direct Examinatoion

By Mr. Thompson:

Q. Mr. Brenzel, do you reside at Lake Tahoe, do you not? A. Yes, sir.

Q. And what is your residence there?

A. Bijou.

Q. How long have you—that's at the south end of the lake? A. Yes, sir.

Q. In that direction. And you are also a Deputy Sheriff of El Dorado County, isn't that true?

A. Yes, sir.

Q. How long have you lived there at Lake Tahoe area? A. Since 1916.

Q. I see. Now, during the period of time that you have lived there at Lake Tahoe, have you had occasion to become familiar generally with the boat operations on Lake Tahoe?

A. Well, to some extent, yes.

Q. During that period of time, have you become familiar with any commercial boat operations on Lake Tahoe? A. Yes, sir.

Q. And will you now briefly relate to us what those operations were within your knowledge?

A. In regards to the commercial, you mean?

Q. Yes, including, for instance, the question of whether there had ever been a mail boat on the lake? A. That's right.

Q. And matters of that kind?

A. That's right. I believe it was called the "Tahoe," and I have even transferred back and

(Testimony of F. W. Brenzel.)

forth from Tahoe City on it myself, and paid my fare on it.

Q. From Tahoe City at the north end of the Lake? A. That's right.

Q. I see. Will you briefly describe to us what that particular boat operation was, Mr. Brenzel?

A. Well, it conveyed passengers three times a week across the lake. Also, the mail and provisions—whatever was needed at either end of the lake, it carried back and forth.

Q. Do you know whether that boat contacted points on the Nevada side of the lake?

A. I believe it did—Glenbrook.

Q. Glenbrook is located on the Nevada side, is it? A. That's right.

Q. Did it contact Zephyr Cove, do you know?

A. Yes, that is right.

Q. What was the name of that boat?

A. "Tahoe."

Q. Have you ever ridden on that boat when it was transporting mail? A. Yes, sir.

Q. Now, how long ago was that, Mr. Brenzel?

A. Must be eight or ten years ago at least.

Q. Can you tell us up to what period of time this operation continued? Can you state the last time, approximately, that this boat operated insofar as carrying mail and other operations?

A. Well, let's see—I imagine about six or seven years ago.

Q. Do you know where that boat is now?

(Testimony of F. W. Brenzel.)

A. I think I do.

Q. Well, what is your understanding in regard to that?

A. I believe it was sunk in the bottom of the lake off from Glenbrook shore there.

Q. How long ago was that?

A. About that time when they ceased operations.

Q. About six years ago? A. Around that.

Q. Now, are you familiar with any other boat operations of that nature that took place there on Lake Tahoe?

A. Well, there was two boats. I don't remember what the name of the other one was, but there were two boats that made those runs.

Q. I see. And did they also carry mail?

A. I believe they did.

Q. Did you ever ride on those boats?

A. I never rode on the other. I rode on this "Tahoe." I believe they alternated on the trips.

Q. Do you know whether those other boats carried pay passengers?

A. I am pretty sure they did.

Q. You don't know of your own knowledge of anyone that did ride on one of the boats by paid passage? A. No, I don't.

Q. Now, Mr. Brenzel, do you know of any operations of that nature that are taking place there on the lake now?

A. Only just the sight-seeing boats, but they don't carry mail.

Q. They don't carry mail? A. No.

(Testimony of F. W. Brenzel.)

Q. Do you know the names of some of those boats? A. No, I don't.

Q. Do you know what points on the lake they—they leave from, and what other points they contact?

A. Well, they have different piers that they leave from, and different schedules for different sight-seeing trips that make different points according to the schedule.

Q. Do you know whether any of those boats leave points on the California side and contact points on the Nevada side? A. Yes, sir.

Q. What points, Mr. Brenzel, do they leave from on the California side, do you know? And then contact the Nevada side?

A. Well, they would leave what they call Young's Pier there or the El Dorado Pier, Globin's, and Connelly's, and Richardson's, Meek's Bay, Emerald Bay—also Patterson's Boat Harbor.

Q. I see. Were you living there at the lake, Mr. Brenzel, when the railroad operated to Lake Tahoe, contacted a point near the Tavern?

A. No, I—contacted the Tavern—I did, yes.

Q. By the way, Mr. Brenzel, do you know the maximum depth concerning Lake Tahoe? The approximate maximum depths?

A. Well, I imagine it varies. Now, which point are you referring to?

Q. The deepest point in the lake.

A. Well, what I have heard is twelve hundred and some feet, the depth.

(Testimony of F. W. Brenzel.)

Q. You have never examined a geodetic survey map to determine that? A. No, no.

* * *

Cross-Examination

By Mr. Sullivan:

Q. Now, Mr. Brenzel, how long ago was the last time that you ever saw any boat on Lake Tahoe that was—I don't mean a speed boat, but a boat that carried passengers?

A. The last time?

Q. Yes, how long ago?

A. Oh, I guess maybe around seven or eight years ago.

Q. Seven or eight years ago. Did you ever hear of that boat carrying any commerce from out and around the area of the lake at all, products of the farmers anywhere at all?

A. The boat that I refer to seven or eight years ago?

Q. Yes.

A. Yes, sir. It even hauled some for me.

Q. What?

A. A case of eggs, and some hams.

Q. You mean the boat was a boat that made a pleasure trip around the lake, and charged so much for the entire trip?

A. I don't know whether it was a pleasure boat. It was a commercial boat, carried passengers.

Q. Was a boat that traveled the lake, and charged each person so much for going around the

(Testimony of F. W. Brenzel.)

lake, is that right? And, if you wanted to, you could stop any place you wanted?

A. It had the mail. If a passenger was for that place, they took them on.

Q. During the past six years, can you tell me of any boat that carries commerce of any kind on that lake? A. No, I can't say that I do.

Q. Can you tell me the name of any boat or any type of vessel that carries the mail on that lake at the present time, or has for the past six years?

A. No.

Q. Can you tell me any boats up there which are for hire, except such as you can see at Pattison's or those which are speed boats which you can rent? That is the only boats up there, isn't that right? Or privately owned pleasure boats, isn't that right?

A. That's right.

Q. And then *on* the month of June, 1949, there wasn't a single boat of any kind or character that carried passengers for hire on that lake, was there?

A. Carried passengers for hire?

Q. In June of this year?

A. Well, there was those speed boats do.

Q. I don't mean those you rent—commercial boat, there was no such boat, was there?

A. Well, they—there was another big boat besides these small speed boats that carried passengers, hauled thirty or forty people or more.

Q. Made a tour of the lake?

A. That's right.

(Testimony of F. W. Brenzel.)

Q. I am talking about such as you described as a commercial boat. There was none? A. No.

Q. There was none that carried commerce?

A. No.

Q. There was none that carried the mail?

A. That's right.

Q. And hadn't been for at least six years, to your knowledge, isn't that right?

A. That's right.

* * *

CHARGE OF THE COURT

The Court takes judicial notice, and you are to take as an established fact that Lake Tahoe is a navigable body of water under the jurisdiction of the United States of America, and that El Dorado County is within the Northern Division of the Northern District of California, and, so, within the jurisdiction of this court.

* * *

PROCEEDINGS ON MOTION TO DISMISS

August 2, 1949, 10:00 o'Clock a.m.

The Clerk: United States vs. Phil Davis.

Mr. Sullivan: This matter is on to plead.

At this time I wish to file a motion to dismiss the information on the ground of lack of jurisdiction for certain legal reasons. I have already served a copy on the United States Attorney this morning.

The Court: You have served the United States Attorney with a copy?

Mr. Sullivan: This morning.

Mr. Thompson: That is correct.

The Court: Are you prepared to proceed on the hearing of the matter?

Mr. Thompson: In answer to that, your Honor, the Government feels that the question concerning Lake Tahoe as far as being a navigable body of water coming under the jurisdiction of the United States Government is one that needs very little argument.

The Court: You are now prepared to go ahead with the argument?

Mr. Thompson: I haven't the decisions before me at this time, your Honor. I would be prepared within a very short time.

The Court: Suppose I put it over to two o'clock.

Mr. Thompson: That would be agreeable.

The Court: Two o'clock.

Mr. Sullivan: Then will it go over to plead, too, your Honor?

The Court: Yes.

(Thereupon the further hearing of this matter was continued to two o'clock p.m., at which time the following proceedings were had:)

The Clerk: United States vs. Phil Davis.

Mr. Sullivan: May I inquire has your Honor had an opportunity to read the motion?

The Court: Yes.

Mr. Sullivan: I do not wish to add any oral argument to that. All I can say is incorporated in this.

The Court: Mr. Sullivan, I don't think this court is in a position to take judicial notice of whether or not Lake Tahoe is a navigable body of water. It seems to me that is a matter of proof. Apparently the cases you cited to me hold that not only must it be a body of water capable of navigation but it must be at least potentially useful as a navigable body of water. I do not want to pass on that.

A quarter century ago judicial notice would be taken of the fact that was a navigable body of water, but I know the building of the highway around the lake has changed conditions. The steamer upon which people depended for transportation of themselves and property is history. I do not know whether there is any transportation by water or not on that lake, and it seems to me it is a matter of proof.

I will say to the United States Attorney that unless there is proof that it is a navigable body of water I will have to dismiss the case.

Mr. Thompson: You mean in connection with Mr. Davis' motion?

The Court: No; I say if in the trial of the case it is not proved to be a navigable body of water I will have to dismiss the case. The Court would not have jurisdiction if it was not a navigable body of water.

Mr. Thompson: You do not feel, your Honor, that under the rule of law—pardon me—258 U. S. 554, that navigability in fact is the test of navigability in law, that under such rule of law your Honor is in a position at this time to take cognizance of the characteristics of the use of Lake Tahoe waters, and is in a position to make a ruling as a matter of law——

Mr. Sullivan: Navigable in fact; that is our position exactly. Navigable in fact is what it means. It isn't used for commerce——

The Court: I do not think the test is whether it is capable of use for commercial purposes. It should be used for commercial purposes or be potentially useful for that purpose.

Mr. Thompson: Your Honor does not believe that it has to be shown that it is being used necessarily for commercial purposes at the present time?

The Court: No, not presently. Potentially useful for that purpose.

Mr. Thompson: However, it is common knowledge, which I do not believe Mr. Sullivan would dispute, that Lake Tahoe is commonly used by boats for hire.

Mr. Sullivan: Boats for hire—this decision is right directly in point on that.

The Court: If it is used for pleasure that does not convert it from a non-navigable to a navigable body of water.

Mr. Thompson: Your Honor is taking the posi-

tion that it has to be shown that commercial uses are being made——

The Court: I say it has to be used commercially or potentially useful commercially.

Mr. Thompson: You don't feel that the circumstances are such that you can take——

The Court: These cases that are submitted to me, I haven't read them, I haven't had the time——

Mr. Thompson: You don't think the circumstances are such that you can take judicial notice of the fact that Lake Tahoe is so used?

The Court: I don't know, I don't know. There is no evidence Lake Tahoe is used for commercial purposes. I don't know whether it is commonly known it is used for commercial purposes.

Mr. Sullivan: Mr. Thompson, as a matter of act it isn't.

Mr. Thompson: Of course, there may be dispute as to what is meant by commercial purposes.

Mr. Sullivan: Well, this case holds—the only case in the United States involving a prosecution of this kind, a Missouri case—the boats were hired, your Honor, by duck hunters—that is commercial, but that doesn't determine it to be navigable waters at all.

Mr. Thompson: Let me read for a moment, your Honor, an excerpt from the case of *Mintzer v. North American Dredging Company*, 242 Federal 553, affirmed in 245 Federal 297: "While a court may take judicial notice of the navigability of waters

within its jurisdiction, the navigability of those of a more insignificant character must be established by evidence."

I take the position that Lake Tahoe would come under the former category, being a large, well known body of water.

Also in the case of *Ortel vs. Stone*, 205 Pacific, 1055, it was held that a lake three-quarters of a mile in length and one-eighth of a mile in width and having an area of about 40 acres and an ordinary depth of from ten to fifty feet is navigable.

Mr. Sullivan: Sure; if it is used for commerce it is.

Mr. Thompson: Your Honor, my examination of the decisions cited in Title 33, which is Navigation and Navigable Waters, do not from my observation point to the matter——

The Court: Well, I need not go further in this matter today than to say this: In any event, it is a matter of proof, if the Court cannot take judicial notice.

Mr. Sullivan: That is correct.

The Court: Assuming I cannot take judicial notice you will have to prove it is a navigable body of water. So I feel the motion to dismiss should be denied.

Mr. Thompson: Yes. However, Your Honor——

The Court: If in the trial of the case you cannot convince me that I can take judicial notice that this is a navigable body of water then you will have to prove that it is.

Mr. Thompson: In connection with the burden of proof that is on the Government, is it necessary that I prove that Lake Tahoe is presently used or potentially capable of being used commercially?

The Court: I do not have to rule on that. You better be prepared, however, to prove it.

The motion to dismiss will be denied.

CERTIFICATE OF REPORTER

I, Clarence E. Wight, Official Reporter, certify that the foregoing pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: Filed Jan. 17, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals or certified copies filed in the Court in the above entitled case, and that they constitute the record on appeal herein as designated by the parties herein.

Information.

Defendant's motion to dismiss information.

Minute order of August 2, 1949.

Minute order of November 7, 1949.

Verdict.

Notice of intention to move for a new trial.

Notice of appeal.

Designation of record, etc.

Supplemental request for record.

Government's designation of record on appeal.

Order extending time to docket appeal.

Seven Volumes Reporters Transcript.

U. S. Exhibits 1 to 8 incl., 9a-9b-9c, 10 and 11.

Defendants Exhibits A, B and C.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 14th day of January, 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 12414. United States Court of Appeals for the Ninth Circuit. Phil Davis, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 17, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12414

The PEOPLE OF THE UNITED STATES,

vs.

PHIL DAVIS.

SUBSTITUTION OF ATTORNEYS

I, the undersigned, hereby substitute Clifton Hildebrand, Esq., in the place and stead of Leo A. Sullivan, Esq.

Dated: December 1, 1949.

/s/ PHIL DAVIS.

I hereby accept the foregoing substitution.

/s/ CLIFTON HILDEBRAND.

I hereby consent to the foregoing substitution.

/s/ LEO A. SULLIVAN.

[Endorsed]: Filed December 2, 1949.

At a Stated Term, to wit: The October Term, 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the fifth day of December in the year of our Lord one thousand nine hundred and forty-nine.

Present: Honorable William Denman, Chief Judge,
Presiding, Honorable William E. Orr,
Circuit Judge, Honorable Walter L. Pope,
Circuit Judge.

[Title of Cause.]

ORDER SUBMITTING AND GRANTING MOTION FOR ADMISSION TO BAIL PENDING APPEAL

Ordered motion of appellant for admission to bail pending appeal presented by Mr. Sheridan Downey, Jr., counsel for appellant, in support of said motion, and by Mr. Harlan Thompson, Assistant United States Attorney, counsel for appellee, in opposition thereto, and submitted to the court for consideration and decision.

Upon consideration thereof, It Is Further Ordered that said motion, be, and hereby is granted, and that appellant be admitted to bail pending determination of his appeal herein in the amount of One Thousand Dollars (\$1,000.00), the bail bond to

be conditioned as required by law, to be approved by the United States Attorney and the trial judge, and to be filed with the clerk of the District Court.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT PHIL DAVIS WILL RELY UPON THIS APPEAL

1. That the District Court was without jurisdiction to try appellant for the crime charged.
2. That the trial court was in error in charging the trial jury that the United States had jurisdiction over the waters of Lake Tahoe.

Respectfully submitted,

/s/ CLIFTON HILDEBRAND,
Attorney for Appellant.

[Endorsed]: Filed January 19, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTION OF RECORD TO
BE PRINTED IN BEHALF OF APPELLANT
PHIL DAVIS

Appellant, Phil Davis, requests the Clerk of the above court to have the following portions of the record printed:

1. That portion of the testimony of Witness F. W. Brenzel contained in reporter's transcript page 482, line 11, through and including page 487, line 10.
2. That portion of the testimony of Witness F. W. Brenzel contained in reporter's transcript, page 532, line 4, through and including page 534, line 12.
3. That portion of the Court's instructions to the jury found in the reporter's transcript, page 843, line 22, through and including page 844, line 2.
4. All those proceedings had on the 2nd day of August, 1949, being the proceedings on Motion to Dismiss for Want of Jurisdiction and contained in reporter's supplemental transcript pages 2, through and including page 7.

Respectfully submitted.

/s/ CLIFTON HILDEBRAND.

Affidavit of mailing attached.

[Endorsed]: Filed January 19, 1950.

No. 12,414

IN THE

United States Court of Appeals
For the Ninth Circuit

PHIL DAVIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

CLIFTON HILDEBRAND,

1212 Broadway, Oakland 12, California,

Attorney for Appellant.

FILED

MAR 24 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,414

IN THE
United States Court of Appeals
For the Ninth Circuit

PHIL DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

**STATEMENT OF PLEADINGS AND JURISDICTION
OF THIS COURT.**

This appeal is brought from a judgment of conviction by the District Court for a violation of Section 526m of Title 46, U.S.C.A. The appellant here claims that the trial Court was in error for two reasons: (1) that the District Court had no jurisdiction of the subject matter of the case for the reason that the alleged crime occurred on waters not subject to the jurisdiction of the United States, and (2) for the reason that the trial Court was in error in taking the question of navigability of the lake from the jury and instructing the jury as to such fact as a matter of law.

STATEMENT OF FACTS.

The appellant was convicted of operating a motor boat in a reckless or a negligent manner and thus endangering the life and limb of other persons in the State of California, but on the waters of Lake Tahoe. Appellant here makes no point as to the sufficiency of the evidence establishing reckless operation of the boat and for the purpose of this brief that question will be conceded. The only evidence introduced at the trial relating to the question of jurisdiction was the testimony of F. W. Brenzel contained in the Clerk's Transcript, starting on page 10 and ending on page 17. This evidence simply establishes that Lake Tahoe is approximately twelve hundred feet deep at certain points; that up to six or seven years ago a mail boat made regular runs to various points on the lake both on the Nevada and California sides and carried passengers, mail and provisions back and forth; that since that time the lake is used for recreational purposes and that there are still sight seeing boats that carry passengers all around the lake for hire.

It is further apparent that this Court is entitled to take judicial notice of further facts in connection with Lake Tahoe and its geographic surroundings. We shall hereinafter cite authority to that effect.

We believe that the Court is entitled to take judicial notice that the lake is about twenty miles long and ten miles wide and in most parts deep enough for very considerable navigation by boats of large size; that the lake is completely surrounded by three national forests, namely: Tahoe National Forest, El Dorado

National Forest and Toyabee National Forest; that the lake lies on the boundary line between California and Nevada, with large sections of the lake in each state; that the upper Truckee River is a small mountain stream which is the only river that flows into the lake; that the lower Truckee flows out of the lake and thence through Nevada, terminating at Lake Pyramid, which itself has no outlet; that neither of these rivers could possibly support any navigation but that the lower Truckee River is susceptible to use as a source of electric power; that there is no commercial fishing for profit in the lake; that the lake is situated at an elevation of about 6,000 feet; that paved State and United States highways enclose the entire lake area and that these highways connect with the main State highways; that the Southern Pacific railroad lines pass through the nearby city of Truckee.

THE LAW.

STATUTES AFFECTING THE JURISDICTION OF THIS COURT.

We believe that the only statutes which can possibly affect the question here involved are as follows:

1. Article I, Section 8, Clause 3, United States Constitution: "Congress shall have power to regulate commerce among the several states."

2. Article III, Section 2, Clause 1, United States Constitution: "The jurisdictional power shall extend * * * to all cases of admiralty and maritime jurisdiction."

3. Section 267, of the Harbors and Navigation Code of the State of California:

“Operation of power boat at more than five nautical miles per hour in certain areas prohibited: Application of section. Every owner, operator, or person in command of any power boat, is guilty of a misdemeanor who operates it or permits it to be operated at a speed in excess of five nautical miles per hour in any of the following areas:

“(a) Within 100 feet of any person who is engaged in the act of bathing.

“(b) Within 200 feet of any:

(1) Beach frequented by bathers.

(2) Swimming float, diving platform, or life line.

(3) Way or landing float to which boats are made fast or which is used for the embarkation or discharge of passengers.

“The provisions of this section shall apply to all waters which are in fact navigable regardless of whether they are declared navigable by this code. (Added by Stats. 1949, ch. 566, Sec. 2.)”

It is apparent that the jurisdiction of the District Court must spring from either one or both of the above constitutional provisions. Section 526m of Title 46 under which this action was prosecuted is contained as a part of the whole body of laws enacted by the Congress to regulate admiralty and maritime affairs. It is our belief that when Congress enacted such law it did so without any belief that the power to pass such law flowed from the commerce provision of the Consti-

tution. Accordingly, if that premise is correct the real question here involved is whether or not the waters of Lake Tahoe may lawfully be made a part of the whole maritime jurisdiction which has been set aside to the Federal Government.

We have studied many decisions concerning the power of Federal Courts to take jurisdiction over different bodies of water bordering and lying in this country but have been unable to find any case in which the Courts have seen fit to apply maritime statutes to any inland body of water *not connected to the sea*.

On the other hand a number of decisions have established certain inland bodies of water not connected with the sea to be subject to Federal control as navigable bodies of water useful in interstate commerce.

During the early years of this nation maritime law was applied only to coastal waters and those inland waters actually affected by the tide. However, as the great navigable rivers began to increase in importance as arteries of commerce, the Supreme Court of the United States ruled that the Federal Government had power over such waters not only as a part of maritime jurisdiction but also through the power of the Courts to regulate interstate commerce. From the time of this decision up to the present the law has been made by judicial opinion rather than any further statutory enactment and we forthwith proceed to a discussion of those decisions.

THE LAW OF MARITIME JURISDICTION.

The landmark decision of the Supreme Court in the case of *The Propeller Genesee Chief et al v. Fitzhugh et al.*, 13 Law. Ed., 1058 also cited as 12 Howard 441, fully discussed the meaning of the Act of Congress extending the jurisdiction of District Courts to certain cases on the Lakes and navigable waters connecting such lakes. The decision was concerned with a collision between two vessels on Lake Ontario and the question, of course, was as to the jurisdiction of Federal Courts under the maritime laws. In deciding that this was indeed a proper subject of maritime law, the Court made the following statement:

“Again. The Union is formed upon the basis of equal right among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tidewater rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western states. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this Court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the

great objects of the framers of the Constitution; that is, a perfect equality in the rights and the privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.

“The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide.

“Now, there is certainly nothing in the ebb and flow of the Tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.”

It will be seen that the fundamental reason for empowering the national Courts to regulate maritime matters lies in the necessity for uniform administration of such matters for the obvious reason that ships

moving in commerce up and down our coast or from one state to another would be unreasonably burdened by a variety of State legislation requiring many dissimilar standards. Note that the Court emphasizes the importance of this factor in the event of war or other national emergency. We think this Court should further note that these reasons entirely lose their cogency when one attempts to apply them to waters totally unconnected, however remotely, to the sea. Although we, of course, can conceive that certain boats of small size can actually be moved from an inland body of water to a body of water connected with the sea.

In the case of *Jackson v. The Steam Boat Magnolia*, 15 Law. Ed. 909, 61 U.S. 343, the Court again considered the question of jurisdiction of District Courts in the event of collisions on public navigable rivers above the tidal flow and reached the same conclusion. The Court stated:

“In conclusion, we repeat what we then said, that ‘courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce and a speedy decision of controversies where delay would be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which this Union was formed, to confine these rights to the States bordering on the Atlantic, and to the tide water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable

streams of the Western States. Certainly such was not the intent of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution; that is, perfect equality in the rights and privileges of the citizens of the different States, not only the mode of administering them.'

"The decree of the court below, dismissing the libel for want of jurisdiction, is therefore reversed; and it is ordered that the record be remitted, with directions to further proceed in the case as to law and justice may appertain."

Again the reasoning of the Court for applying maritime law to important inland waters seems to rest upon the importance of uniform application of such laws among all the States. Again we fail to see how this reasoning can be applied to any inland body of water not accessible to or from the sea.

In the case of *The Steamer Daniel Ball v. United States*, 10 Wall. 557, 19 Law. Ed. 999, the Court considered the question of the power of Congress to regulate by way of licensing the movements of any vessel upon the bays, lakes, rivers or other navigable waters of the United States. We call the Court's attention to the following language contained in this decision:

"A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in

law which are navigable in fact. And they are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

* * * * *

"We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the federal juris-

diction would be entirely ousted, and the constitutional provision would become a dead letter.”

It would seem from this language that the mere fact that an inland body of water may happen to lie upon the borders between two states is of no importance unless it is actually a highway of commerce or unless it can be held to be a part of maritime jurisdiction, through connection with the sea.

It seems likewise apparent from the ruling of the Court in the *Daniel Ball* case, *supra*, that there is a clear distinction between the meaning of the term “Navigability” for the purpose of determining State rights to the beds of such waters and the term “navigability” when applied to the question of jurisdiction of the federal government.

In the case of *Perry v. Haines*, 48 Law. Ed. 73, 191 U.S. 17, the Court considered a case in which the plaintiff sought to enforce a lien for repairs of a vessel which was being used in navigating the Erie Canal. The Court held that the federal government had jurisdiction for the reason that the canal itself connected waters which gave access to communication between ports and places in different states and territories. Note the language of the Court at page 78 where it is said:

“It is not intended here to intimate that, if the waters, though navigable and wholly territorial and used only for local traffic, such, for instance, as the interior lakes of the State of New York, they are to be considered as navigable waters of the United States.”

The case of *London Guarantee Co. v. Industrial Accident Commission*, 279 U.S. 109, 73 Law. Ed. 632, was an appeal from the Supreme Court of the State of California involving the application of the Workmen's Compensation Act of the State to maritime injuries in the coastal waters. The facts were concerned with the drowning of the decedent in Santa Monica Bay while employed by a pleasure fishing company. This decision fully discusses the development of maritime law and makes it clear that in such a tort action the locality of the accident is controlling and that the compensation law of the State is inapplicable. The decision emphasizes the importance of applying characteristic rules and regulations to all maritime accidents in order to promote harmony in the equal application of such laws to all persons employed in maritime work.

Again the Supreme Court emphasizes the fact that the accident took place on a body of water connected to the sea. Note, further, that the particular vessel involved was not engaged in interstate commerce and that the Court took jurisdiction solely under Article III, Section 2 of the Constitution rather than the Commerce clause. In this connection the Court stated:

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things having no necessary connection with one another, and are conferred in the Constitution by the separate and distinct grants."

Again the question of distinction between power of the federal government under the commerce clause and under the maritime clause is made clear in the case of *The Lucky Lindy* decided by the 5th Circuit Court of Appeals, 76 Fed. (2d) 561. This decision was concerned with a vessel navigating in the Harvey Canal and the question whether or not the Collector of Customs had a right of seizure. During the course of the decision holding that the seizure was proper the Court stated:

“Appellants, to support their view that the Francovich Canal is not a navigable water, to which the admiralty and maritime jurisdiction extends, rely on *Gulf & I. R. Co. v. Davis* (D.C.), 26 F. (2d) 930; *Id.* (C. C. A.) 31 F. (2d) 109; *United States v. Doughton* (C.C.A.), 62 F. (2d) 936; *Leovy v. United States*, 177 U. S. 621; 20 S. Ct. 797, 44 L. Ed. 914; *United States v. President, etc., of Jamaica* (C.C.A.), 204 F. 759. These cases are concerned not with admiralty and maritime jurisdiction, but with the power of Congress over public waters susceptible of being used as highways for interstate or foreign commerce. The argument that they measure the limits of admiralty jurisdiction ‘is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, Sec. 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.’

“Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 640, 19 L. Ed. 266, said: ‘Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution, by separate and distinct grants.’”

The authorities seem to uniformly hold that as to regulation of crimes and torts the question of State or Federal control is determined entirely by the locality of the crime or tort. We believe the decision which discusses this question most fully is the decision of the Supreme Court in the case of *Southern Pacific v. Jensen*, 244 U.S. 206, 61 L.Ed. 1086. This was an appeal from the Court of Appeals of the State of New York and was concerned with the question of the application of the New York Compensation Act to an injury to a longshoreman working on a steamship going between ports of different states, but injured while it was lying at a pier in the North River. The Court held that the state law did not apply and that the maritime laws covered such an accident. The Court stated:

“The civil jurisdiction in admiralty in cases ex contractu is dependent upon the subject matter; in cases ex delicto it is dependent upon locality. In cases of the latter class, if the cause of action arises upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged

in commerce at all, or not upon any vessel, the maritime courts have jurisdiction.”

And note the language of the Court as follows:

“In the very realm of navigation, the authority of the states to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. * * *

“In each of these cases except the last, which related to intrastate transport the state regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce.”

In the case of *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58 L.Ed. 1208, the Court considered a case involving injury to a stevedore which occurred on board ship while lying in the port of Baltimore. The Court held that maritime law applied. The decision discusses the scope of admiralty jurisdiction at some length and we call this Court's attention to the following language:

“We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of ‘obvious principle or of very accurate history.’ The *Blackheath* (*United States v. Evans*) 195 U.S. 361, 365, 367, 49 L.Ed. 236-238, 25 Sup. Ct. Rep. 46. And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in

the present case the wrong which was subject of the suit was, we think, of a maritime nature, and hence the district court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship, caused by the negligence of a ship or a person, or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow."

It is apparent that admiralty and maritime jurisdiction has been extended to include navigable bodies of water separated by great distances from the sea; but again we wish to point out that there is apparently no case of controlling authority in which the maritime jurisdiction has been extended to waters totally unconnected with the sea either artificially or naturally. An early decision of the District Court of New York, *In re Long Island Transportation Company*, 5 Fed. 599, contains a rather complete summary of all the Federal decisions up to that time which relate to the extent of Federal Jurisdiction over navigable waters. The particular facts in that case were concerned with the application of the Act limiting liability of ship owners operating vessels on the East River in New York State. The Court defines maritime torts as follows:

"Maritime torts, on the other hand, are all injuries, trespasses and unlawful or injurious acts

done and committed on the sea or navigable waters *connected with the ocean*. Their character as maritime depends exclusively on the place where they are committed. While there are serious questions as to what waters are properly to be included under the term 'navigable waters', or waters connected with the sea, there is no question that the waters over which this vessel ran are subject to the admiralty jurisdiction, and that all torts there committed are maritime torts."

This is the only decision which we have read which states in so many words that admiralty jurisdiction is confined to waters connected in one way or another with the sea. We do not, of course, assert that this old decision by a District Court is conclusive authority for determination of this perplexing problem.

In *Escanaba Co. v. Chicago*, 107 U.S. 691, 27 L.Ed. 442, the question of the power of the State of Illinois to construct bridges over navigable waters came before the Supreme Court. This decision is authority for the proposition that even though waters are clearly navigable the rights of the states to exercise authority of all kinds upon such waters remains paramount until specific Act of Congress clearly supercedes the State authority in any given activity. The Court spoke as follows:

"The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters

they form a continuous channel for commerce among the States or with foreign countries. *The Daniel Ball*, 10 Wall. 557 (77 U.S. XIX, 999). Such is the case with the Chicago River and its branches. The common law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.

“The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve their free navigation.

“But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. * * *

“The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exercised are national in their character, and admit and require

uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is, therefore, a declaration that they shall remain free from all regulation. *Welton v. Mo.*, 91 U.S. 275 (XXIII, 347); *Henderson v. Mayor of N. Y.*, 92 Id. 259 (XXIII, 543); *Mobile Co. v. Kimball*, 102 Id. 691 (XXVI, 238).

“On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in *County of Mobile v. Kimball*: ‘The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress for when that acts, the state authority is superceded. Inaction of Congress upon these subjects of a local nature, or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority.’ 102 U.S. 699 (XXVI, 240).”

We will not attempt to cite to this Court dictionary or textbook definitions as to what constitutes the meaning of the term commerce, the Supreme Court itself has obviously never been able to fix any exact definition covering every aspect of this complicated question.

In the case of *Hopkins v. U. S.*, 171 U.S. 578, 43 L. Ed. 290, the Court did define commerce in the following language:

“Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states and the power to regulate it embraces all the instruments by which such commerce may be conducted.”

In *U. S. v. The Steamer Montello*, 11 Wall. 416, 20 L. Ed. 191, the Fox River of the State of Wisconsin was considered by the Supreme Court as to its navigability as a highway of interstate commerce. This case is authority for the proposition that the Courts may take judicial notice of the principal geographical features of any important body of water in making such determination. In that connection the Court said:

“We are supposed to know judicially the principal features of the geography of our country and,

as a part of it, what streams are public navigable waters of the United States.”

The Court then went on to point out that even though it had examined many histories and geographies the data was insufficient to supply necessary information to fix navigability. The object of this suit was to enforce collection of penalties alleged to be owing to the United States for failure to comply with certain maritime regulations. We are somewhat puzzled as to the exact meaning of the ruling of the Court in holding that maritime regulations could not be applied on the evidence adduced in addition to those facts which were made evidence by way of judicial notice. It would appear to us that this case is analogous to the case now under consideration in many respects. In *The Montello* the water was obviously susceptible to navigation by large steamers and the Court points out that commerce is carried on over such waters destined for other states from Wisconsin and likewise the water is used for carriage of goods entering the state from other states and foreign countries. Clearly such waters under earlier, as well as later, rulings of the Court constituted navigable waters for the purpose of determining title and likewise the power of Congress to regulate interstate commerce. Just as clearly the decision of the Court holds that maritime regulations cannot be applied on such class of water. The distinction, of course, between *The Montello* and the case of Phil Davis as to the facts involved lies in the fact that Lake Tahoe bisects

the California-Nevada State line. However, we strongly urge that the language of the Court in holding that a maritime regulation may not be applied on waters not having connection with other waters so as to form a continued highway over which commerce may be carried on with other states or foreign countries should be carefully considered by this Court.

We believe that the most important decision of the Supreme Court relating to the quality and extent of commerce necessary to impress a water with navigable character is the case of *Leovy v. U.S.*, 177 U. S. 622, 44 L. Ed. 914.

The facts of this case were concerned with determining whether the waters of a by-pass or stream caused by the overflow of the Mississippi River and forming a channel between the river and the Gulf of Mexico were navigable waters of such character that the United States would have authority to prevent the construction of a dam erected in the by-pass. After reviewing the earlier authorities on this subject the Supreme Court stated:

“It is a safe inference from these and other cases to the same effect which might be cited that the term, ‘navigable waters of the United States,’ has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress granted to regulate such waters is not expressly granted in the Constitution, but it is a power incidental to the express ‘power to regulate commerce with foreign nations, and among the several states, and with

the Indian tribes;’ and with reference to which the observation was made by Chief Justice Marshall, that ‘it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.’ *Gibbons v. Ogden*, 9 Wheat. 194, 6 L. ed. 69.

“While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of ‘navigable waters of the United States,’ or to define what traffic shall constitute ‘commerce among the states,’ so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.

“The trial judge instructed the jury as follows: ‘What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another state. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another state from the state in which you start on that journey, that is a navigable water of the United States. It is so called in contradistinction

to waters which arise and come to an end within the boundaries of the state. * * * But, if from the water in one state you can travel by water continuously to another state, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable, and connected with waters that permitted a journey to another state, then it is a navigable water of the United States.' And again: 'But the fact I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the gulf, because if, from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi river, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi river.'

"If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all of the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

"Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levees to restrain overflowing rivers within their

banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.

“We also think that these instructions are open to the further criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi river on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not ‘every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable.’ But in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture. (*Rowe v. Granite Bridge Corp.*) 21 Pick. 344.

“We have read the testimony offered on behalf of the United States to show the kind and extent of the navigation of the Red Pass, and there is no view we can take of it that warranted the jury in finding that interstate commerce was ever transacted there.”

The 1930 decision of the Supreme Court in the case of *U. S. v. Utah*, 75 L. ed. 844, 283 U. S. 64, would seem to be a decision that is important in resolving the present question. This case was largely concerned with the question of title to the beds of certain rivers running through the state of Utah and into Arizona, including the Colorado River. The Court incidentally discussed the question of navigability of such rivers for the purpose of Federal regulation and control. Much historical and geographical evidence was submitted by way of the findings of a master. The Court had occasion to discuss the important question of the prospective use of the Colorado River for substantial commerce in the future as related to the characteristics of the adjacent town and settlements along the river. In this connection the Court stated:

“The question of that susceptibility in the ordinary condition of the rivers, rather than the mere manner or extent of actual use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual

use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the court said, in *Packer v. Bird*, 137 U. S. 661, 667, 34 L. ed. 819, 820, 11 S. Ct. 210: 'It is, indeed, the susceptibility, to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or soils under them.' In *Economy Light & P. Co. v. United States*, 256 U. S. 113, 122, 123, 65 L. ed. 847, 854, 855, 41 S. Ct. 409, the court quoted with approval the statement in *The Montello* (*United States v. The Montello*) 20 Wall. 430, 22 L. ed. 391, *supra*, that 'the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.'

"It is true that the region through which the rivers flow is sparsely settled, the towns of Green River and Moab are small, and otherwise the country in the vicinity of the streams has but few inhabitants. In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such

of its rivers as were navigable in fact at the time of the admission of the state either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put."

In the case of *U. S. v. Doughton*, 62 Fed. (2d) 936, the question concerned the right of the Federal Government to prevent the construction of a bridge over a river. The decision contains a considerable discussion of the question of navigability and a review of the authorities relating to such question. The decision stated in part:

"On the other hand, it is not sufficient to bring a stream under the regulatory power of Congress that it merely be susceptible of some sort of navigation. If this were true, there is scarcely a creek or stream in the United States that would not be a navigable water of the United States or that could be bridged by the state highways or the railroads without the approval of the Secretary of War. Congress would thus be enabled under the commerce clause to exercise control over in-

ternal affairs of the states in relation to streams where interstate commerce has no existence, actual or potential; and the states would be deprived of vital power in regulating matters of domestic concern, having no relation to commerce. This would clearly contravene the whole theory of the Constitution as to the division of the powers of sovereignty between state and national governments. We think that the true rule is that, to come within the regulatory power of Congress, the stream must be susceptible in its natural condition of becoming a highway of interstate or foreign commerce; i.e., it must be of such a nature and so situated that there is at least a practical possibility of its being used as a highway for such commerce; for, as has been said, the power of Congress over navigable waters of the United States, arising as it does under the commerce clause of the Constitution, 'has reference to commerce of a substantial and permanent character to be conducted thereon.' "

An interesting decision of the District Court for the Northern Division of Idaho is reported in the case of *U. S. v. Ladley*, 42 Fed. (2d) 474. This decision was concerned with the question of the navigability of an inland lake and issues arose as to not only the question of extent of water for use by ships and boats but also as to the character of the surrounding country in determining whether useful commerce would ever be carried on over such waters. The evidence showed that pleasure boating, fishing and movement of logs were about the extent of com-

mercial use of the lake. In this connection the Court stated:

“The test of navigability in fact of a stream or lake is whether in its natural condition it is used or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *Oklahoma v. Texas*, 258 U. S. 574, 42 S. Ct. 406, 66 L. Ed. 771. To meet that test a water course should be susceptible of use for such purposes. It should be of practicable usefulness to the public as a public highway in its natural state, and without the aid of artificial means. It must have had a useful capacity long enough to be used as a highway of transportation, and such purposes, use and navigability must be established by clear evidence.”

In the case of *Harrison v. Fite*, a decision by the 8th Circuit contained in 148 Fed. 781, there is a long discussion of the question of navigability. The suit involved an attempt by officers of a shooting club to secure an injunction against market hunters from trespassing on the waters of Big Lake lying in the northeast corner of the state of Arkansas and extending to the Missouri line. The legal issue involved was whether or not the waters were of a private nature so that the shooting club could prevent trespass or were of a public navigable nature open to use by anyone. The Court reviewed the history of commercial use of Big Lake and the adjoining Little River and found that although the waters had been used

to some extent in early days that the waters no longer were of such quality as to be useful aids to interstate commerce. In this connection the Court stated:

“Whatever may have once been the capacity and utility of the body of water known as Big Lake as a highway of commerce or in the floatage of products of the fields and forests along its banks, the conditions that are to be considered are those of recent years and the present. The evidence showed that there had been no successful navigation of this water in recent years, with the exception of canoes, skiffs and dugouts of the hunters and fishermen; that it is not being used to float the products of the field and forest to market and cannot be profitably and successfully used for that purpose. If practical adaptability and usefulness are the tests, the finding of the lower court was right.”

Apparently from this decision the 8th Circuit very clearly has held that even though a body of water may extend along a state line and have some capacity for carriage of boats that it is not necessarily public navigable waters unless there is a showing of present or probable use of such waters in substantial and profitable commercial commerce.

In the case of *Toledo Liberal Shooting Co. v. Erie Shooting Club*, the 6th Circuit Court considered the question of navigability of a 4,000-acre bay or arm of one of the Great Lakes. It was conceded that the water was of sufficient depth to support navigation at the point where it connected with the lake but the remainder of the waters were of a very shallow

character. Accordingly, the Court held that such waters were subject to private ownership. The Court finds that the pursuit of water fowl in small boats and pleasure fishing are not commerce within the meaning of the Constitutional term. The Court further pointed out that it has been the rule in this country that in order to impress waters with the character of navigability that they must be useful for the purposes of trade or agriculture.

The only decision of a Federal Court relating to a violation of the same statute (Sec. 526m, 46 U.S.C.A.) as is concerned in this case appears to be the case of *U. S. v. Ross*, 74 Federal Supplement 6. The defendant was charged with operating a motor boat in a reckless and negligent manner and accordingly endangering the lives of other persons. The charge was dismissed by the District Court for the reason that the waters over which the boat was being operated were held to be not of a navigable character. The decision does not discuss the question of application of maritime law in the case but based it simply upon two reasons, namely, that the waters involved were not well adapted to the movement of large boats and that the water itself did not serve any useful purpose for the conduct of commercial trade and agriculture. The water concerned was a borrow pit separated from the Mississippi River by a levee with various connections between the river and the pit over which small boats can be operated. The defendant was a commercial boat operator engaged in carrying duck hunters on the waters for hire. The facts of this case, of

course, are different in that while there appears to have been a direct connection with waters leading to the sea the entire lake or pit lay within the boundaries of one state. The decision sheds some light on the requirement that the waters in question be of a useful nature in furthering interstate commerce.

We believe that we should call the Court's attention to the fact that the statute under which defendant is here charged with crime is a part of a large number of statutes regulating the use of motor boats. Nowhere in Title 46 does there appear to be any definition of the waters to which the regulations shall apply. The section itself is contained in subchapter 2, relating to registry and recording, the subchapter being titled simply The Motor Boat Act of 1940. This act was a general amendment to all of the statutes previously passed relating to regulation of motor boats, the new act being made effective in 1940. An examination of the old chapter 16 of Title 46 entitled "Regulation of Motor Boats" and enacted in 1910 likewise seems to contain no definition of the waters to which the regulations should be applied. The Court should note that the enforcement of the administration of these regulations was transferred from the Bureau of Marine Inspection and Navigation of the Department of Commerce to the United States Coast Guard by act of Congress effective in July, 1946.

We have not deemed it advisable to review any further authorities relating to the power of Congress to regulate navigable waters under the commerce clause of the Constitution. We know that this Court

is well familiar with the numerous decisions extending this power to enforcement of the Fair Trade Act as applied to industries shipping goods in interstate commerce and many other kinds of Federal regulation. In all this class of cases the question of eventual movement of the goods into commerce is conceded. The difficult questions arise where an industry is only indirectly concerned with the movement of such goods in such commerce.

ARGUMENT.

It appears from the foregoing decisions that the Federal Courts of this land have never before had occasion to consider the right of the Federal Government to enforce the terms of a criminal statute relating to movement of boats on purely inland waters. We are not aware of any instance since the establishment of Federal Courts in California where such Courts have ever been concerned with regulating the waters of Lake Tahoe, for whatever purpose.

We do not concede that the mere assumption of authority on these waters by the Coast Guard or any other Federal agency would necessarily be of any importance in determining whether the Federal Court has jurisdiction to enforce criminal statutes such as the one under consideration. On the other hand, we do believe that it is significant that at the trial of this cause the Government adduced no evidence indicating that the United States Coast Guard was presently or in the past had been concerned with navigation upon

the Lake. We take it that, if the waters of the Lake are deemed to be within maritime jurisdiction, that it is the duty and obligation of the Government to take reasonable steps toward the enforcement of all laws which it claims apply to such waters.

We feel that this Court should carefully analyze the practical facts relating to all the geographical and commercial aspects of Lake Tahoe. We emphasize that it is here sought to enforce a Federal penal statute on a mountain lake totally divorced and separated from any connection with other navigable waters. That it is a lake lying at over 6,000 feet elevation and entirely surrounded by national forests. We take it that by the establishment of such forests for an indefinite period of time in the future that the government has, practically speaking, withdrawn all of the surrounding area from use by the states as areas of commercial growth and usefulness. We believe that these facts entirely negative any theory that the Lake may in the foreseeable future become a body of water substantially in aid of interstate commerce.

We believe that the Court should look at the problem realistically and not find navigability simply by invoking the doctrine of *de minimis*.

We can, of course, conceive that a regular business could be maintained in transporting various supplies across the Lake from one resort to another, accomplishing, incidently, a passage over state lines. It is likewise easy enough to speculate that the laws of Nevada and California policing and regulating the use of motor boats upon the lake may not now nor in the

And secondly, we contend with equal emphasis that the waters of this Lake are so far from being within the contemplation of maritime affairs and so isolated from the sea that jurisdiction cannot be made a part of federal government control over true maritime shipping. We respectfully urge this Court for an order reversing the judgment of conviction.

Dated, Oakland, California,
March 22, 1950.

Respectfully submitted,

CLIFTON HILDEBRAND,

Attorney for Appellant.

No. 12,414

IN THE

United States Court of Appeals
For the Ninth Circuit

PHIL DAVIS,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

C. ELMER COLLETT,

Assistant United States Attorney,

ANTOINETTE E. MORGAN,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

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PAUL P. O'BRIEN

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Tahoe is not within the admiralty and maritime jurisdiction of the United States in that its waters have no connection with the ocean, and (2) that the legal navigability of Lake Tahoe is dependent on factual issues which should have been left to the jury.

Appellant's "Statement of Facts", so far as it goes, is on the whole acceptable. It contains a recital of facts in evidence which are undisputed and unimpeached. It also recites a set of facts of which it is admitted the Court is entitled to take judicial notice. Either group of facts taken alone, and most certainly both together, establish at the least that Lake Tahoe is a navigable body of water affording a channel for interstate waterborne commerce. This, without more, it will be developed, legally defines the waters of Lake Tahoe as navigable waters of the United States, proves the applicability of the sanctions of the Motor Boat Act of 1940 to those waters, and the correctness of the given instruction.

In two respects, appellee submits, the statement contains inaccuracies. Thus, strictly speaking, the testimony of the witness, Brenzel, as to the present day commercial use of Lake Tahoe, is that in addition to a big boat carrying passengers on a tour of the lake (Tr. R. 16), there are also sightseeing boats carrying passengers for hire which leave points on the California side and contact points on the Nevada side (Tr. R. 13, 14). Further, the statement that the Lake is completely surrounded by national forests is not correct, if the impression meant to be conveyed is that there is no privately owned land around Lake

Tahoe or that the lands bordering the Lake are controlled by the United States and withdrawn by it from all commercial activity, enterprise and development. It is a matter of common knowledge that the Lake is a recreation center of international repute and popularity; that its shores are spotted with numerous towns, settlements and resorts to which large numbers of visitors, as well as owners of permanent summer homes located at the lake shore, travel every year via the several excellent motor vehicle highways leading to it. There are other relevant facts, not mentioned by appellant, of which the Court might take judicial notice. These will be referred to in the argument, although not because it is believed any further proof beyond the record evidence, is at all necessary to uphold the correctness of the given instruction.

QUESTION PRESENTED.

The question then is:

Did the District Court Err in Instructing the Jury as a matter of law, that Lake Tahoe is a navigable body of water within the jurisdiction of the United States?

SUMMARY OF ARGUMENT.

I.

The Motor Boat Act of 1940 applies to all navigable waters of the United States.

II.

The Motor Boat Act of 1940 represents a valid exercise by Congress of the National Power to Regulate Interstate Commerce; also of the constitutional grant to the United States of admiralty and maritime jurisdiction.

III.

Lake Tahoe is a navigable water of the United States; as a public waterway, it is subject to national regulation and control, and subject consequently, to the terms of the Motor Boat Act of 1940; absence of outlet to the sea does not affect its character.

IV.

The character of Lake Tahoe as navigable water of the United States was established by inherently credible evidence which was undisputed and unimpeached; and by facts of which the Court can take judicial notice. The District Court, therefore, properly instructed the Jury that "Lake Tahoe is a navigable body of water within the jurisdiction of the United States".

ARGUMENT.
I. THE MOTOR BOAT ACT OF 1940 APPLIES TO ALL NAVIGABLE WATERS OF THE UNITED STATES.

The Motor Boat Act of 1940 is entitled "An Act to Amend Laws for preventing collisions of vessels, to regulate equipment of said motor boats *on the*

navigable waters of the United States, and for other purposes". (April 25, 1940, c. 155, 54 Stat. 163). Its scope and objective are apparent from its title. The statement in appellant's brief (p. 33) that the Act does not define the waters to which the regulations shall apply is, therefore, incorrect. In *Kelly v. Washington* (1937) 302 US. 1, at page 4, the Supreme Court observed that the body of regulations of which this Act is a part, relate to the navigable waters of the United States.

II. THE MOTOR BOAT ACT REPRESENTS A VALID EXERCISE BY CONGRESS OF THE NATIONAL POWER TO REGULATE INTERSTATE COMMERCE; ALSO OF THE CONSTITUTIONAL GRANT TO THE UNITED STATES OF ADMIRALTY AND MARITIME JURISDICTION.

In *Miami Beach Jockey Club v. Dern* (Dist. Col. Ct. Appeals, 1936) 83 F. (2d) 715, cert. den. 299 U.S. 556, the Court stated:

"The United States derives its power over the waterways of the nation from two separate constitutional grants—the one the power to regulate foreign and interstate commerce (Article 1, Section 8, cl. 3) the other the exclusive grant of admiralty and maritime jurisdiction (Article 3, Sec. 2, cl. 1). They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants."

The Act here involved prescribes standards for the safe conduct of navigation on public navigable waters. Having that objective, it is submitted that the Act

is both a regulation of interstate commerce and the declaration of a substantive rule of admiralty law. Appellant admits the latter to be true, and certainly, to the extent that the Act prohibits and penalizes conduct tantamount to a maritime tort, it is lawful congressional legislation pursuant to the National Admiralty and Maritime jurisdiction.

In *Miller v. United States* (9th Cir. 1937) 88 F. (2d) 102, at page 104, this Court said:

“The Constitution of the United States provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction (Art. 3, Sec. 2, cl. 1). Although, in the absence of legislation by Congress, the courts merely by virtue of this grant of judicial power have no jurisdiction of maritime crimes and offenses, * * * this clause does give Congress power to provide for the punishment of offenses committed upon any navigable waters other than those of the high seas, although within the jurisdiction of a state * * *

However, Appellant states as his belief, that when Congress enacted the Act, it did so without any belief that its power was derived from the Commerce Clause of the Constitution (opening Brief, p. 4). The statement is wholly unjustified and unjustifiable. The entire Act is devoted to the prescription of regulations aimed to promote safety in navigation. The effect on commerce, of compliance or violation with measures directed to safe navigation is not debatable. In *Kelly v. Washington*, supra, the Supreme Court

examined and analyzed the scope of the Motor Boat Act of 1910, (36 Stat. 462), to determine to what extent Congress, *in the exercise of its power over interstate and foreign commerce*, had legislated on inspection requirements for the hull and machinery of motor vessels. It is admitted (opening brief, p. 33) that the later Motor Boat Act of 1940 was but amendatory of all the statutes previously passed relating to regulation of motor boats, which included, of course, the former Motor Boat Act of 1910. Moreover, the Supreme Court declared at an early date that commerce included navigation and that

“the power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie * * * For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England.”

“It is for Congress to determine when its full power shall be brought into activity, and as to

the regulations and sanctions which shall be provided.”

Gilman v. Philadelphia (1865), 70 U.S. (3 Wall.) 713, 724, 725.

Again in 1940, the Supreme Court said:

“The power of the United States over its waters which are capable of use as interstate highways arises from the Commerce Clause of the Constitution * * * It was held early in our history that the power to regulate commerce necessarily included power over navigation.”

United States v. Appalachian Power Co. 311 U.S. 377, 404.

Many other decisions of the Supreme Court have recognized that the power of Congress to enact legislation governing and relating to navigation on navigable waters of the United States emanates from the Commerce Clause, and that such power is a plenary one. *The Daniel Ball*, 77 U.S. (10 Wall.) 557; *United States ex rel. Greathouse v. Dern*, 289 U.S. 352; *County of Mobile v. Kimball*, 102 U.S. (12 Otto) 691; *Cardwell v. American Bridge Co.*, 113 U.S. 205; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53; *Economy Light & Power Co. v. United States*, 256, U.S. 113.

III. LAKE TAHOE IS A NAVIGABLE WATER OF THE UNITED STATES; AS A PUBLIC WATERWAY, IT IS SUBJECT TO NATIONAL REGULATION AND CONTROL, AND SUBJECT, CONSEQUENTLY, TO THE TERMS OF THE MOTOR BOAT ACT OF 1940; ABSENCE OF OUTLET TO THE SEA DOES NOT AFFECT ITS CHARACTER.

In 1870, the United States Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, framed the verbal yardstick by which the term "navigable waters of the United States" has since been measured. There the Court was construing the term as used in a federal statute making it unlawful to transport freight or passengers by steamboat over such waters, without the license required by federal law. At page 563, the Supreme Court said:

"These rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact *when they are used, or are susceptible of being used*, in their ordinary condition, *as highways for commerce, over which trade and travel are or may be conducted* in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway *over which commerce is or may be carried on* with other States or foreign countries in the customary modes in which such commerce is conducted by water." (Italics supplied.)

The rule of *The Daniel Ball* and the language in which it is couched has been followed and repeated in numerous Supreme Court decisions. See:

The Montello, 87 U.S. (20 Wall.) 430, 439;

Economy Light & Power Co. v. U.S., 256 U.S. 113, 121;

Oklahoma v. Texas, 258 U.S. 574, 586;

United States v. Holt Bank, 270 U.S. 49, 56.

The only change made to date in the definition of *The Daniel Ball* was one of enlargement and of extension. In *U.S. v. Appalachian Power Co.*, 311 U.S. 377, the Supreme Court held that navigable waters of the United States included not only waters capable of navigation in interstate commerce in their *natural condition*, but those which may be rendered so capable by reasonable improvements. Appellee invites the Court's special attention to this last decision for the concise but exhaustive analysis there made of the factors which determine waters to be navigable waters of the United States.

Today, therefore, waters are legally regarded as navigable waters of the United States, subject as such to federal control in the regulation of interstate commerce and the exercise of the nation's admiralty and maritime jurisdiction—whenever they meet two basic requirements for their characterization as such, that is (1) navigability, and (2) capacity for use in waterborne interstate commerce. The waters of Lake Tahoe, in fact and in law, meet and exceed these requirements.

The facts alone of which this Court is entitled to take judicial notice legally establish Lake Tahoe as navigable waters of the United States.

First, as to the navigability of Lake Tahoe, this Court has already taken judicial notice of the considerable size of Lake Tahoe. *Law v. Smith*, 288 Fed. 7, (CCA-9th, 1923). It may also take judicial notice of its navigability, a well known fact attested to by the incident which gave rise to this proceeding. *Arizona v. California*, 283 U.S. 423; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 697; *Wear v. Kansas*, 245 U.S. 154, 158. See also: *Continental Land Co. v. United States*, (9th Cir. 1937) 88 F. (2d) 104, in which this Court took notice of the navigability of the Columbia River as a matter of fact and law.

Second, as to the capacity of Lake Tahoe for use in interstate commerce:

Courts are entitled to take judicial notice of the capacity of waters within their jurisdiction as a medium for interstate commerce. In *The Montello*, 78 U.S. (11 Wall.) 411, the Supreme Court said:

“We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States.”

Courts have likewise taken judicial notice that rivers within their jurisdiction are used in interstate commerce.

United States v. Griffin, 58 F. (2d) 674;

United States v. Crary, 1 Fed. Supp. 406.

As to Lake Tahoe, appellee submits that had no evidence whatsoever been introduced to establish the capacity of Lake Tahoe for purposes of interstate commerce, the geographical, historical and notoriously known facts about its waters still warrant judicial notice of the lake's adaptability to serve those ends as they might arise.

Geographically, Lake Tahoe is a long, wide, inland sea of great depth. It is bisected lengthwise and almost in half by the California and Nevada State boundary line. Accessibility to its shores by motor vehicle highways and bus service presents no problem.

Historical reference reveals that in the early days of California's statehood, the lumber industry brought much activity to the shores of the lake. The timber which built the towns of Nevada and lined the shafts and tunnels of its mines was transported across Lake Tahoe from forest to sawmill by schooner and raft.

See:

Fremont Rider's "California" (1925), pages 270 et seq. The MacMillan Co., Publisher.

"California—A Guide to the Golden State," compiled and written by the Federal Writers Project of W.P.A. for California (American Guide Series, 1939), pages 589 et seq. Hastings House, N. Y., Publisher.

This Court is privileged to take judicial notice of these historically recorded facts.

Brown v. Piper, 91 (1 Otto) 37;

The Montello (11 Wall. 411), *Supra*;

Arizona v. California, 283 U.S. 423.

If the truth were that since the end of the mining days of the West, Lake Tahoe had never again served the ends of interstate commerce, it nevertheless would have still remained and be today a navigable water of the United States; for only an abandonment by Congress can erase the characteristic of a once established navigable water of the United States.

Economy Light & Power Co. v. United States,
256 U.S. 113, 123, 124;

United States v. Appalachian Power Co., 311
U.S. 377.

In *Arizona v. California*, 283 U.S. 423, the Court stated that commercial disuse does not amount to an abandonment of a navigable river *or prohibit future exercise of federal control*.

But commerce on Lake Tahoe did not entirely end with the turn of the century.

The commercial adaptability of Lake Tahoe for uses of the present and memorable past are facts of notoriety. Hardly a native Californian or Nevadan of adult years has not known or at least heard of the old steamboat "Tahoe"; how, until a few years back, it regularly plied its way leisurely around the lake, docking at points in California and Nevada to pick up and drop mail, passengers and provisions. The present day speedier pleasure cruises for hire are also widely known attractions to the annual and extensive tourist trade which now flourishes at "the Lake."

“Commerce is not prevented because the object of it is to serve the pleasure of passengers.”

London Guarantee & Accident Company, Ltd. v. Industrial Accident Commission, 279 U.S. 109, 124.

The future commercial potential of Lake Tahoe to again serve the needs of heavier industry and commerce cannot be disregarded. *Economy Light & Power Co. v. United States*, *supra*; *United States v. Appalachian Power Co.*, *supra*.

Surrounding the Lake are national forests. Appellant argues that the establishment of forest reserves withdraws the area from potential commercial usefulness (Appellant's Brief, p. 35). The truth is exactly the contrary. The objective of national forest reserves is not aesthetic. The legislative aim is to stimulate the growth of standing timber and to preserve its utilization for eventual commercial and industrial purposes in an economic and un wasteful way. (Title 16 U.S.C., Sec. 471(b) 475). To this end, administrative regulations have been formulated to deal in an orderly manner with the cutting, processing, transport, and export of the timber of national forests. (C.F.R. 1949 Ed. Title 36 Ch. II, Sec. 221.3—Forest Service). The commercial potential value of Lake Tahoe in connection with the eventual utilization of these surrounding forest reserves is a matter to be reckoned with.

Gilman v. Philadelphia, *Supra*;

Economy Light & Power Co. v. U.S., *Supra*;

*United States v. Appalachian Power Co.,
Supra.*

In the interim, the land and water within these forest reserves are always open to the public for commercial adaptation not in conflict with conservation of the timber resources. (16 U.S.C. 478, 481, 520, 524, 525.)

The Government of the United States has for many years considered Lake Tahoe one of its navigable waters. This Court should judicially notice the fact that in 1916 Congress asserted national control over Lake Tahoe. It authorized the establishment and maintenance there of aids to navigation. (Act, Aug. 28, 1916, C. 414, Sec. 3, 39 Stat. 538). The fixed and floating aids which, pursuant to such authority, were established and exist at Lake Tahoe today, are a virtual part of the topography of the area; and it is a matter within judicial knowledge that the establishment of such aids to navigation necessarily requires meandering and charting by the United States Coast and Geodetic Survey. (U.S. Coast and Geodetic Survey Chart, 5001). Appellant attaches significance to the fact that no evidence was introduced to show Coast Guard activity at Lake Tahoe; and from the absence of evidence seeks to have this Court understand that there was no such activity and to infer, further, that the United States did not regard itself in control of Lake Tahoe. The activities of the Coast Guard at Lake Tahoe in the enforcement and administration of federal navigation laws is com-

monly known in the area within this Court's jurisdiction. They should be known to appellant. If this Court may resort to geographies and histories (*The Montello*, 11 Wall., Supra) to provide it with facts of which it may take judicial notice, it is respectfully submitted this Court may also take judicial notice of the official activities within its jurisdiction of a department of the United States Government, which can be readily ascertained by official inquiry.

“* * * A wide variety of matters relating to government and its administration has been judicially noticed.”

31 Corp. Juris, Evidence, Sec. 34, P. 589.

In *Greeson v. Imperial Irr. Dist.* (9th Cir., 1932) 59 F. (2d) 529, this Court held itself bound, by the dictates of the Supreme Court, to take notice of public activities within the common experience of men within the jurisdiction, saying at page 531:

“And if the judge's memory is at fault he may resort to means he may deem safe to refresh his memory. *Brown v. Piper*, 91 U. S. 37, 236 L.Ed. 200”.

At least this Court must notice that it does not follow that the Coast Guard has not assumed jurisdiction of Lake Tahoe from the fact merely that no evidence of its activities there appear in the record of this case.

Appellant argues that in no case has federal admiralty and maritime jurisdiction been extended to waters not connected with the open sea. Since appel-

lant admits that numerous decisions have established inland bodies of water not connected with the ocean to be subject to federal laws in regulation of interstate commerce (opening brief, p. 5), it makes no difference here whether or not this argument of appellant has any substance. The Act is still valid under the commerce clause. But it is nevertheless pertinent to observe that none of the cases or case quotations in appellant's brief support the view that navigable waters useful in interstate commerce must connect with the ocean to sustain federal admiralty and maritime jurisdiction. Analyses of each of appellant's cited cases would unduly lengthen this brief. The total lack of relevancy of all of them to the argument advanced by appellant renders analyses superfluous. Actually, many of the cited cases are directly relied on by appellee; none disaffirm the oft-repeated rule of *The Daniel Ball*, supra, defining navigable waters of the United States,—subject as such to federal control and regulation,—to be those waters affording a capacity for navigation in interstate commerce. Appellee in no way disputes the rule of *Leovy v. U.S.*, 177 U.S. 622 (appellant's brief, p. 22) that waters are not to be regarded as public navigable waters merely because they permit of an interstate journey, without any consideration of their commercial capacity, actual or potential. But outlet to the sea is of no more significance in determining the status of navigable interstate waters for purpose of federal control, than is the ebb and flow of the tide. Of the latter, the Supreme Court, speaking of the

admiralty jurisdiction of the United States over inland lakes, said in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443:

“Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.”

Were the Supreme Court there speaking of outlet to the sea instead of ebb and flow of the tide, its comments would have been the same and a conclusive answer to appellant's position. Recent words of the Supreme Court on the subject of waters within federal admiralty jurisdiction contain no mention of any requirement of connection with the sea. In *Southern S.S. Co. v. Labor Board*, (1942) 316 U.S. 31, at p. 41, the Court stated without reservation;

“It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country. *The Genesee Chief*, 12 How. 443.”

IV. THE CHARACTER OF LAKE TAHOE AS NAVIGABLE WATERS OF THE UNITED STATES WAS ESTABLISHED BY INHERENTLY CREDIBLE EVIDENCE WHICH WAS UNDISPUTED AND UNIMPEACHED AND BY FACTS OF WHICH THE COURT CAN TAKE JUDICIAL NOTICE. THE DISTRICT COURT, THEREFORE, PROPERLY INSTRUCTED THE JURY THAT "LAKE TAHOE IS A NAVIGABLE BODY OF WATER WITHIN THE JURISDICTION OF THE UNITED STATES".

The navigability in fact and its uses and capacity for use as an interstate waterway for commerce have been proved by the record testimony of F. W. Brenzel (Tr. R. 10-17). His testimony remains uncontradicted and unimpeached. Its credibility is undeniable.

The status of Lake Tahoe which renders it subject to federal navigation laws has been likewise established by facts admittedly a proper subject for the judicial notice of this Court. (Appellant's Brief, pp. 2, 3).

In further confirmation of that status, appellee has related herein further facts within the judicial knowledge of the Court.

Neither the jurisdiction of the United States over the waters of Lake Tahoe nor the jurisdiction of the Court in this proceeding depended in any degree on the settlement of issues of fact by the jury. The issue of jurisdiction was one entirely of law. It was properly resolved in the Court below. And the jury was properly charged that, as an established fact, Lake Tahoe is a navigable body of water under the jurisdiction of the United States of America. *Horning v. District of Columbia*, 254 U.S. 135.

It is respectfully submitted that the judgment of conviction must be affirmed.

Dated, San Francisco, California,

June 26, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

C. ELMER COLLETT,

Assistant United States Attorney,

ANTOINETTE E. MORGAN,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12,414

IN THE

United States Court of Appeals

For the Ninth Circuit

PHIL DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

CLIFTON HILDEBRAND,

1212 Broadway, Oakland 12, California,

Attorney for Appellant.

FILED

JUL 17 1950

PAUL P. O'BRIEN

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IN THE
United States Court of Appeals
For the Ninth Circuit

PHIL DAVIS,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT IN RESPONSE TO BRIEF OF APPELLEE.

We submit that the appellee in its brief has made no sincere attempt to analyze the true nature of the meaning of the Commerce and Admiralty provisions of the Federal Constitution. We should first like to point out that at page 14 of its brief appellee cites the case of *London Guarantee & Accident Company, Ltd. v. Industrial Accident Commission*, 279 U.S. 109, 124, as authority for the proposition that the business of renting boats for pleasure purposes in some way constitutes that type of commerce which the makers of the constitution intended to permit the United States to regulate.

This Court should note that in the case cited the question raised was entirely different from the question present here. In the *London Guarantee* case an

employee of a pleasure boat concern met his death in the waters of Santa Monica Bay. The Supreme Court determined that in view of the locale of the accident that the Federal Compensation Provisions apply rather than those of the State of California. The long decision makes it perfectly clear that the reason for so holding lay in the fact that according to Admiralty law a uniform standard of Compensation has been set up which applies to all waters under the jurisdiction of the United States, and further that the fact that an employee is working for a company engaged in the pleasure business on such waters as a seaman does not exempt him from Federal jurisdiction. To reason that this decision has changed 150 years of decisions by our Federal Courts as to the meaning of interstate commerce is obviously fallacious. To reason that because a seaman employed by a pleasure concern on coastal waters is entitled to Federal Compensation and therefore that the waters of Lake Tahoe are Federal waters is a complete *non sequitur*.

The appellee has made much of the decision of the Supreme Court in the case of *United States v. Appalachian Power Co.*, 311 U.S. 377, 404. We concede that this decision is the most far-reaching decision by the United States Supreme Court in extending Federal control over inland waters. We believe that the present case is entirely distinct and that the present case can be clearly distinguished from the *Appalachian* case by simply using a little reasoning and common sense.

Clearly the Commerce provision of the Constitution was enacted so as to permit Congress to prevent any

burden or restraint upon substantial commercial trade between the various states. It is obviously one thing for Congress to control the erection of a dam in an interstate river which may interfere for many years in the future with possible commerce on such river and further may interfere with the newly recognized right of the Federal Government to control hydro-electric power on navigable rivers. It is certainly a totally different thing for the Federal Government to attempt to control the operation of small pleasure craft on inland waters which for many years have not been used in interstate commerce and for many years in the future will almost surely not be used for interstate commerce. No reasonable man can suggest how the regular operation of a motor boat on the water of Lake Tahoe now or in the foreseeable future could possibly interfere with that sort of useful substantial commerce between the states which actually constitutes interstate trade.

The appellee cites no case in its brief nor can we discover in all of the hundreds of Federal decisions concerning the power of the United States over navigable waters wherein it has been held that maritime regulations totally unconnected with the protection of commerce have been held to apply on inland waters not connected with the sea. If, therefore, the jurisdiction of the United States in this case must be based upon protection of interstate commerce, let the Government explain in what way the penal law that we are here concerned with is calculated to protect the non-existent commerce on Lake Tahoe. If on the other hand the jurisdiction of the Government rests upon

the Maritime and Admiralty authority granted by the Constitution, note that the defendant in this case will apparently become the first resident of these United States in recorded judicial history to be punished for a violation of maritime law on an inland water having no connection with the sea.

In conclusion, we submit that the Federal Courts have by many decisions established the following rules defining the Federal jurisdiction over United States waters:

1. The meaning of "navigable waters" so far as permitting Federal control is distinct from the meaning of the same term when determining the power of a state over waters within its boundaries. (*The Steamer Daniel Ball v. United States*, 10 Wall. 557.)

2. Whether the body of water lies wholly in one state or extends into more than one is not the determining factor as to Federal control. (*The Steamer Daniel Ball*, *supra*.)

3. Interior lakes used only for local traffic are not to be considered as navigable waters of the United States. (*Perry v. Haines*, 191 U.S. 17.)

4. The Commerce power and the Admiralty power are totally distinct and have no necessary connection. (*London Guarantee Co. v. I.A.C.*, 279 U.S. 109.)

5. Maritime jurisdiction is entirely dependent upon locality but commerce jurisdiction results from the necessity for protecting interstate trade in any locality. If the locality is not maritime then the state

retains power of control unless it can be shown that navigation in interstate commerce will be at least incidentally affected. (*Southern Pacific v. Jensen*, 244 U.S. 206; *Escanaba Co. v. Chicago*, 107 U.S. 691.)

6. The term "navigable waters of the United States" has reference to commerce of a substantial and permanent character and a practical construction must be put on any attempt to determine whether such commerce exists. (*Levoy v. U. S.*, 177 U.S. 622.)

7. The likelihood of future substantial commercial use is a factor to consider. (*U. S. v. Utah*, 283 U.S. 64.)

8. Past usage of the water for commercial purposes is to be considered as well as possible improvements to facilitate movement of shipping. (*U. S. v. Appalachian Power Co.*, 311 U.S. 377.)

9. The erection of a dam in a stream once used in interstate commerce and affecting hydro-electric power in several states is subject to Federal control. (*U. S. v. Appalachian*, *supra*.)

If these are indeed the rules which limit the power of the United States over inland waters, then the use of a motor boat on Lake Tahoe is most certainly not an activity calculated to permit any interference with the right of the State of California or the State of Nevada to regulate such activity.

Dated, Oakland, California,
July 17, 1950.

CLIFTON HILDEBRAND,
Attorney for Appellant.

No. 12415

United States
Court of Appeals
For the Ninth Circuit.

CHIN CHIU FONG and CHIN CHIU CHUNG,
Appellants,

vs.

ARTHUR J. PHELAN, Acting District Director
of the Immigration and Naturalization Service,
San Francisco District,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

JAN 4 - 1950

WILLIAM B. GORDON

No. 12415

United States
Court of Appeals
For the Ninth Circuit.

CHIN CHIU FONG and CHIN CHIU CHUNG,
Appellants,

vs.

ARTHUR J. PHELAN, Acting District Director
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Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MR. JOSEPH S. HERTOGS,

Attorney for Petitioners and Appellants,
580 Washington Street,
San Francisco, California.

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

On appeal from the United States District Court
for the Northern District of California, South-
ern Division.

Decision of Judge Michael J. Roche.

In the Southern Division of the United States
District Court for the Northern District of
California

Habeas Corpus No. 29099R

In the Matter of the Applications of
CHIN CHIU FONG and CHIN CHIU CHUNG
for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Joseph S. Hertogs on behalf of
the Chin Chiu Fong and Chin Chiu Chung respect-
fully shows:

I.

That the said Chin Chiu Fong and Chin Chiu
Chung, the persons in whose behalf this writ is ap-
plied for, are now detained and restrained of their
liberty by the respondent, Arthur J. Phelan, as the
Acting District Director of the Immigration and
Naturalization Service, San Francisco District, and
his officers and agents; that the said Chin Chiu
Fong and Chin Chiu Chung are now confined in the
Detention Facilities of the Immigration and Natu-
ralization Service at 630 Sansome Street, City and
County of San Francisco, State of California;

II.

That no one has filed, in behalf of the said Chin
Chiu Fong and Chin Chiu Chung, a previous appli-
cation for a writ of Habeas Corpus in and about
the matter set forth herein to any court;

III.

That the petitioner has been advised by the San Francisco Office of the Immigration and Naturalization Service that the said Chin Chiu Fong and Chin Chiu Chung are to be deported from the United States on August 25, 1949; that such deportation would deprive the said Chin Chiu Fong and Chin Chiu Chung of residence in the country of their claimed citizenship; that such deportation will take effect unless this Court intervened to prevent such deportation;

IV.

That the said Chin Chiu Fong and Chin Chiu Chung arrived at the port of San Francisco, State of California, ex China National Aviation Corporation Plane XT 101 on December 15, 1948; that they seek admission as United States citizens such citizenship having been acquired under the provision of Section 1993 United States Revised Statutes; that their father, Chin Yow Kim, was born at New York, New York, on June 18, 1911; that the United States citizenship of Chin Yow Kim is conceded by the Immigration and Naturalization Service;

V.

That subsequent to their arrival Chin Chiu Fong and Chin Chiu Chung were detained for further examination before a Board of Special Inquiry; that thereafter on February 23, 1949, the Board of Special Inquiry voted to exclude the applications

from admission to the United States; that the excluding decision of the Board of Special Inquiry has been affirmed on appeal by both the Acting Assistant Commissioner of Immigration and Naturalization and the Board of Immigration Appeals;

VI.

That the said Chin Chiu Fong and Chin Chiu Chung were denied, during the Board of Special Inquiry hearing, the right to have a friend or relative present; that the Board of Special Inquiry failed to properly inform the said Chin Chiu Fong and Chin Chiu Chung of this right as required by 8 C.F.R. 130.2;

VII.

That the said Chin Chiu Fong and Chin Chiu Chung were denied a fair and impartial hearing by the Board of Special Inquiry; that the Board of Special Inquiry acted in an unlawful and improper way; that the Board had a biased preconceived opinion before hearing all of the evidence; that such allegation is not based upon any one statement but upon the entire record; that due to the lack of a reasonable time a copy of the record is not annexed;

VIII.

That the excluding decision, insofar as it relates to the applicant, Chin Chiu Fong, is not supported by the evidence; that the Board of Special Inquiry, during the examination of Chin Chiu Fong, stated:

Q. You are advised that the testimony given by Lee Ngook Hong on January 28, 1949, very nearly agrees with the testimony given by you before this Board. Do you have any comment to make?

A. I have no comment. I was just telling the truth.

that the said Lee Ngook Hong is the alleged mother of the applicants, Chin Chiu Fong and Chin Chiu Chung; that the said Lee Ngook Hong entered the United States for permanent residence about one year ago;

IX.

That the said Arthur J. Phelan and his officers and agents as aforesaid threaten to transport the bodies of the said Chin Chiu Fong and Chin Chiu Chung beyond the jurisdiction of this Court to the country of Hongkong; that the said Chin Chiu Fong and Chin Chiu Chung are minors, natives of Hongkong, and of the Chinese race; that they have resided, except for a few months, in China; that China is now engaged in civil war that would endanger the lives of the said Chin Chiu Fong and Chin Chiu Chung; that to deport the said Chin Chiu Fong and Chin Chiu Chung to Hongkong or China would be unusual and inhuman punishment, contrary to the dictates of humanity;

X.

That said detention and restraint are illegal, and their illegality consists in the following, among other things, to wit:

(a) The applicants, Chin Chiu Fong and Chin Chiu Chung, have been denied the rights guaranteed to them by "due process of law" clause of U.S.C.A. Constitutional Amendment 5.

(b) That such deportation would be in conflict with the policy, practice and rule of the Attorney General not to deport a person to a country or territory under enemy domination.

/s/ JOSEPH S. HERTOGS,
Attorney for Petitioners.

State of California,
City and County of San Francisco—ss.

Joseph S. Hertogs, being first duly sworn, on behalf of the petitioners in the above entitled proceeding, says:

That he has read the foregoing petition, and knows the contents thereof, and that the facts therein alleged are within his knowledge and that the same is true, except as to the matters therein stated upon information or believe, and as to those matters that he believes it to be true; that affiant is petitioners' attorney and that petitioners cannot read English proficiently and are detained in the

custody of respondent and, therefore, are unable to verify said petition and that affiant, therefore, makes this affidavit.

/s/ JOSEPH S. HERTOGS,

Affiant.

Subscribed and sworn to before me this 25th day of August, 1949.

[Seal] /s/ L. RUTH WILBUR,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires February 8, 1955.

[Endorsed]: Filed August 25, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

Habeas Corpus No. 29099R

CHIN CHIU FONG and CHIN CHIU CHUNG,
Petitioners,

vs.

ARTHUR J. PHELAN,

Respondent.

WRIT OF HABEAS CORPUS

To: Arthur J. Phelan, Acting District Director,
Immigration and Naturalization Service, United
States Department of Justice, 630 Sansome
Street, San Francisco, California.

Greeting:

You Are Hereby Commanded that the bodies of

Chin Chiu Fong and Chin Chiu Chung by you restrained of their liberty, as it is said detained by whatsoever names the said Chin Chiu Fong and Chin Chiu Chung may be detained, together with the day and cause of their being taken and detained, you have before the Honorable Michael J. Roche, Judge of the United States District Court in and for the Northern District of California, Southern Division, at the court room of said court, in the City and County of San Francisco at 9:30 o'clock a.m., on the 12th day of September, 1949, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness, the Honorable Michael J. Roche, United States District Judge at San Francisco, California, this 25th day of August, 1949.

/s/ MICHAEL J. ROCHE.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Arthur J. Phelan, Acting District Director of the Immigration and Naturalization Service, port of San Francisco, California, and for cause why a Writ of Habeas Corpus should not issue herein shows:

I.

That the persons in whose behalf the Order to Show Cause was issued (hereinafter termed the

“applicants”) arrived at the port of San Francisco, California, on December 15, 1948 and applied for admission to the United States.

II.

That the applicants herein were held for examination by a Board of Special Inquiry with relation to their right to enter the United States; that thereafter and on February 17, 1949, the said applicants were refused admission to the United States by said Board of Special Inquiry on the grounds that they and each of them were in fact aliens not in possession of proper documents which would entitle them to admission to the United States.

III.

That on appeal to the Commissioner, Immigration and Naturalization Service, Washington, D. C., the excluding decision was affirmed on April 26, 1949. A further appeal to the Board of Immigration Appeals was dismissed on July 20, 1949.

IV.

That the Board of Special Inquiry was duly appointed under the provisions of Sec. 17 of the Immigration Act of 1917, 39 Stat. 887, 8 U.S.C.A. 153.

V.

That the original record of the entire proceedings before the Immigration and Naturalization Service pertaining to these applicants is affixed hereto and

made a part hereof as respondents' Exhibits A, B, and C.

Wherefore, respondent prays that the Order to Show Cause be dismissed and that the Petition for Writ of Habeas Corpus be denied.

/s/ ARTHUR J. PHELAN,
Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California.

[Endorsed]: Filed September 19, 1949.

[Title of District Court and Cause.]

ORDER DENYING PETITION

The above-named applicants, Chin Chiu Fong and Chin Chiu Chung, seek admission into the United States as United States citizens, alleging acquirement of United States citizenship at birth under the provisions of Sec. 1993 Rev. Stat., as the children of a United States citizen father who has previously resided in the United States. The alleged father is a citizen by birth and his wife, the alleged mother, has already been admitted to the United States, pursuant to the provisions of 8 U.S.C. 232. The applicants were examined by a Board of Special Inquiry at San Francisco and the testimony of the alleged parents and another witness was taken in New York. The Board refused the applicants ad-

mission on the ground that they had failed to prove their alleged blood-relationship and were in fact aliens not in possession of proper documents which would entitle them to admission into the United States. The exclusion order was affirmed on appeal and a further appeal to the Board of Immigration Appeals was dismissed. The conclusion of the Board of Special Inquiry was based on certain marked discrepancies in the testimony of the applicants and the alleged mother. This petition for writ of habeas corpus followed.

It is well settled that the exclusion order of a Board of Special Inquiry is final unless the record discloses an abuse of discretion, an unfair hearing or error of law. *Vajtauer v. Commissioner*, 273 U.S. 103. It appears from the record in this case that the applicants were given a fair hearing and that the Board's findings are supported by evidence of probative value. It is therefore by the Court

Ordered that the petition for writ of habeas corpus be and the same is hereby Denied and that the order to show cause heretofore issued be and the same is hereby Discharged.

Dated: October 21st, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed October 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the Above-Entitled Court and to Defendant and to Frank J. Hennessy and Edgar R. Bonsall, his attorneys:

Take notice that the plaintiffs in the above-entitled action hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment therein rendered and entered in the said Southern Division of the United States District Court for the Northern District of California on the 21st day of October, 1949, in favor of the defendant and against said plaintiffs.

Dated this 27th day of October, 1949.

/s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed October 27, 1949.

[Title of District Court and Cause.]

ORDER

It appearing to the court that the plaintiffs, Chin Chiu Fong and Chin Chiu Chung, by their attorney, Joseph S. Hertogs, have this day filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the Southern Division of the United States District Court for the Northern District of California en-

tered on the 21st day of October, 1949, in favor of the defendant and against said plaintiffs; that the said plaintiffs' attorney has been advised this date that the plaintiffs are to be deported from the United States this date; and that such appeal would be useless unless the plaintiffs are permitted to remain within the jurisdiction of this court pending determination of their appeal.

It Is Ordered that the said plaintiffs shall not be removed from the jurisdiction of this court pending final disposition of their appeal.

Dated this 27th day of October, 1949.

/s/ MICHAEL J. ROCHE.

Approved 10-27-49.

/s/ EDGAR R. BONSALE,
Asst. U. S. Attorney.

[Endorsed]: Filed October 27, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and Exhibits listed below, are the originals filed in this Court, in the above-entitled case,

and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Petition for Writ of Habeas Corpus

Writ of Habeas Corpus

Return to Order to Show Cause

Order Denying Petition and Discharging Order to Show Cause

Notice of Appeal

Order that Petitioners Remain in Jurisdiction of Court

Designation of Contents of Record on Appeal

Exhibits A, B, and C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of December, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12415. United States Court of Appeals for the Ninth Circuit. Chin Chiu Fong and Chin Chiu Chung, Appellants, vs. Arthur J. Phelan, Acting District Director of the Immigration and Naturalization Service, San Francisco District, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 5, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12415

CHIN CHIU FONG and CHIN CHIU CHUNG,
Petitioners-Appellants,
vs.

ARTHUR J. PHELAN,
Respondent-Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL OF THE ABOVE - ENTITLED
MATTER

Comes now Chin Chiu Fong and Chin Chiu Chung, by and through their attorney, Joseph S. Hertogs, files herein the Statement of Points on which Appellants intend to rely in the appeal of the above-entitled matter:

I.

The District Court erred in holding that the appellants were given a fair hearing as required by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States.

II.

That the District Court erred in holding and deciding that the Appellee complied with Section 153,

Title 8, United States Code Annotated (Act of February 5, 1917; 39 Stat. 887).

III.

That the District Court erred in holding and deciding that the Appellee complied with Part 130.2 of Title 8, Code of Federal Regulations (Published 11 F. R. 14232, December 11, 1946).

IV.

That the District Court erred in not remanding the case to the Appellee for a hearing de novo.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

Chin Chiu Fong and Chin Chiu Chung, appellants, in the above-entitled matter, by and through their attorney, Joseph S. Hertogs, (in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure) hereby designate the following to be included in the Transcript on Appeal on their pending appeal from the judgment made, filed and entered in said matter October 27, 1949:

1. Petition for Writ of Habeas Corpus filed on behalf of Chin Chiu Fong and Chin Chiu Chung.
2. Order that petitioners remain within jurisdiction of court.
3. Writ of Habeas Corpus.
4. Return to order to Show Cause filed by Arthur J. Phelan, Acting District Director, Immigration and Naturalization Service, San Francisco, California.
5. Order denying petition for Writ of Habeas Corpus.
6. Notice of Appeal.
7. Stipulation and Order that exhibits be considered in original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between counsel for appellants and counsel for appellee that the exhibits listed in the "Designation of Record on Appeal" may be considered in their original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellants.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ EDGAR R. BONSTALL,
Asst. U. S. Attorney.

So Ordered.

/s/ WM. DENMAN,
Chief Judge.

/s/ H. T. BONE,
/s/ WM. HEALY,
U. S. Circuit Judge.

[Endorsed]: Filed December 13, 1949.

No. 12,415

IN THE

United States Court of Appeals
For the Ninth Circuit

CHIN CHIU FONG and CHIN CHIU CHUNG,
Appellants,

vs.

ARTHUR J. PHELAN, Acting District Director of the Immigration and Naturalization Service, San Francisco District,
Appellee.

BRIEF FOR APPELLANTS.

JACKSON & HERTOGS,

By JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

One of the Attorneys for Appellants.

FILED

FEB 3 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,415

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHIN CHIU FONG and CHIN CHIU CHUNG,
Appellants,

vs.

ARTHUR J. PHELAN, Acting District Director of the Immigration and Naturalization Service, San Francisco District,

Appellee.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

Appellants arrived at the port of San Francisco on the 15th day of December, 1948, seeking admission as United States citizens. Their applications for admission as United States citizens were denied by the Immigration and Naturalization Service.

Appellants petitioned the United States District Court in and for the Northern District of California, Southern Division, for a writ of habeas corpus (T 2). The writ was denied by District Judge Michael J. Roche and this appeal followed (T 10-12).

Jurisdiction of the District Court to entertain the petition for habeas corpus is conferred by 28 U.S.C. Secs. 451, 452, 453. Jurisdiction of the Court of Appeals to review the District Court's final order denying habeas corpus is conferred by 28 U.S.C. Sec. 463.

STATUTE AND REGULATION INVOLVED.

The Act of February 5, 1917, as amended (8 U.S.C. Sec. 153), so far as relevant to this proceeding, provides:

“* * * All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. * * *”

Part 130.2 of Title 8, Code of Federal Regulations (Published 11 F.R. 14232, December 11, 1946) provides *inter alia*:

“The alien shall also be accorded the right to have one friend or relative present: *Provided*, That, if such friend or relative is a witness, he has already completed his testimony. During the preliminary part of the hearing the alien shall be advised of these rights and there shall be entered in the record the exact language in which he is so advised and of his reply. If the alien desires to have counsel or a friend or relative present, he shall be given a reasonable, fixed period of time within which to arrange for such presence.”

STATEMENT OF THE CASE.

The appellants applied for admission to the United States as citizens thereof at the port of San Francisco on December 15, 1948 (T 9). They claim to be the true and lawful blood sons of Chin Yow Kin whose United States citizenship has been conceded by the Immigration and Naturalization Service on numerous occasions (T 3). The appellants were held for examination by a Board of Special Inquiry for determination of their right to entry (T 9). A Board of Special Inquiry hearing was conducted by the Immigration and Naturalization Service (Ex. A).

It is contended by the appellants that the Board of Special Inquiry failed to comply with those provisions of law and regulations which grant substantive rights to persons appearing before such an administrative body.

SPECIFICATION OF ERRORS.

1. That the District Court erred in holding and deciding that the Board of Special Inquiry complied with the Act of February 5, 1917 (8 U.S.C. 153, 39 Stat. 887).

2. That the District Court erred in holding and deciding that the Board of Special Inquiry complied with Part 130.2 of Title 8, Code of Federal Regulations (Published 11 F.R. 14232 December 11, 1946).

3. That the District Court erred in holding that the appellants were given a fair hearing as required

by the “due process of law” clause of the Fifth Amendment to the Constitution of the United States.

4. That the District Court erred in not remanding the case to the Appellee for a hearing *de novo*.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

The sole question to be determined at this time is whether the Board of Special Inquiry afforded these appellants an opportunity, and gave due and proper notice, of their right to have a friend or relative present during the course of their examination.

THE ACT OF FEBRUARY 5, 1917, AND THE REGULATIONS PROMULGATED THEREUNDER, GUARANTEE PERSONS HELD FOR A BOARD OF SPECIAL INQUIRY HEARING CERTAIN RIGHTS AND PRIVILEGES.

In order to present a clear, logical and concise argument, specification of errors Nos. 1 and 2 will be consolidated for that purpose.

Section 23 of the Act of February 5, 1917 (8 U.S.C. 102, 108) grants authority to promulgate such rules and regulations as may be necessary to carry out the purposes and intent of that act. Under Reorganization Plan No. V (5 U.S.C.A. 133v) such authority was delegated to the Attorney General of the United States. Pursuant to such authority Part 130.2 of Title 8, Code of Federal Regulations, was adopted on December 11, 1946.

Regulations have the force and effect of law. This doctrine was clearly expressed by the lower court in the case of *Hamburg American Lines v. U.S.*, 65 F. (2d) 369, 379, certiorari granted 54 S. Ct. 79, 290 U.S. 615, 78 L. Ed. 538, and affirmed 54 S. Ct. 491, 291 U.S. 420, 78 L. Ed. 887.

In the case of *Panama Refining Company v. Ryan*, 55 S. Ct. 241, 293 U.S. 388, 428, 429, 79 L. Ed. 446, 463, the Supreme Court said:

“So, also, from the beginning of the Government, the Congress has conferred upon executive officers the power to make regulations,—‘not the government of their departments, but for administering the laws which they govern.’ *United States v. Grimaud*, 220 U.S. 506, 517, 55 L.Ed. 563, 567, 31 S.Ct. 480. Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined.”

Other decisions to similar effect are:

Fok Young Yo v. U. S., 185 U.S. 286, 303, 22 S. Ct. 686, 46 L. Ed. 918, 920;

Haff v. Tom Tang Shee, 63 F. (2d) 191, 193;
Shizuko Kumanomido v. Nagle, 40 F. (2d) 42,
44;

U. S. v. Karnuth, 31 F. (2d) 785, 788;

Sibray v. U. S., 282 F. 795, 798.

It is a well settled criterion of law that where the words of a statute are clear and unambiguous they are to be strictly construed, and the statute must be

given effect according to its plain and obvious meaning. This rule would apply equally as well to rules and regulations that fall within the scope of delegated authority.

U. S. v. Missouri Pacific R. Co., 49 S. Ct. 133, 136, 278 U.S. 269, 277, 278, 72 L. Ed. 322;

Commissioner of Immigration of Port of New York v. Gottlieb, 44 S. Ct. 528, 265 U. S. 310, 315, 68 L. Ed. 1031;

Russell Motor Car Co. v. U. S., 43 S. Ct. 428, 430, 261 U. S. 514, 520, 67 L. Ed. 778;

U. S. v. Standard Brewery, 40 S. Ct. 139, 140, 251 U.S. 210, 217, 64 L. Ed. 229.

For the purpose of applying the foregoing rules of law to the instant case it is necessary to quote for clarification pertinent parts of the preliminary hearing. They are as follows:

Exhibit A, page 87:

“Q. Your right to enter the United States will be considered by this Board and all evidence in your behalf must be submitted at this hearing. You have the right to be represented in this proceeding by an attorney or by any other person admitted to practice before this Service or the Board of Immigration Appeals. Do you wish to be so represented?”

A. (by 1-4 and by 1-5). I desire to delay this case until I can write a letter to my father and see what he wants us to do.

Q. (if not). Do you waive your right to representation by counsel in this proceeding?

A.

Q. You are informed that you or your qualified representative have the right in this proceeding to examine any witnesses offered in your behalf, to cross-examine any witnesses called by the Government, to offer evidence material and relevant to any matter in issue, and to make objections which shall be entered on the record. Do you understand?

A. (by 1-4). I understand. (by 1-5). I understand.

Q. You also have the right at this hearing to have a friend or relative present, who, if a witness, must have finished testifying. Do you wish to use this right?

A. (by 1-5). I have a friend, Cheung Yin Kuey, who I would like to have present."

Exhibit A, page 85:

"Q. Just how long do you desire to delay this hearing before you will be able to advise us whether or not you desire to be represented by an attorney or by any other person?

A. I shall notify you immediately after I receive word from my father.

Q. You are advised that it is the desire of this Service to complete these hearing as expeditiously as possible. For that reason you should attempt to contact your father either by airmail or telegram. Do you understand?

A. (by each applicant). I understand.

Q. When this hearing is again resumed you should be in a position to advise this Board as to whether your father and mother and Cheung Yin Kuey will appear here as witnesses in your behalf. Do you understand?

A. (by each applicant). I understand.

Q. You are advised that this Board of Special Inquiry will be recessed in order to give you an opportunity to obtain advise from your father concerning the retention of Counsel. You should immediately let us know when you are ready to proceed with this hearing. Do you understand?

A. I understand. (By each applicant)."

Exhibit A, pages 85 and 84:

"Jan. 7, 1949.

H. H. Carson replaces G. T. Patterson as second member.

(BY MEMBER CARSON). I have familiarized myself with all the testimony and evidence adduced thus far in these cases.

Interpreter, Stephen Louie.

APPLICANTS CHIN CHIU CHUNG AND CHIN CHIU FONG RECALLED TO BOARD ROOM AND ADMONISHED THAT THEY ARE STILL UNDER OATH TO TELL THE TRUTH AND SUBJECT TO THE PENALTIES OF PERJURY.

Q. (Chairman to applicants). Are you the same Chin Chiu Chung and Chin Chiu Fong who last appeared before this Board on December 28, 1948?

A. Yes.

Q. At that time, this Board was recessed in order to give you an opportunity to correspond with your father to find out what he wanted you to do in regard to retaining an attorney. Have you received any word from your father?

A. No. (By Chin Chiu Fong). I wrote a letter to my father on December 28, 1948. The last letter was returned to me yesterday for addi-

tional postage. I wrote to my father again yesterday.

Q. You are advised that this Service has received a letter from Edward Hong, Attorney at Law in New York City, entering his appearance as attorney in these cases and has stated that your parents will testify in New York City. The interpreter will now read you these letters, and each of you are requested to state if you are ready to proceed with your hearing at this time.

A. (by Chin Chiu Fong). Yes. (by Chin Chiu Chung). Yes.

Q. Inasmuch as Attorney Edward Hong is in New York City. It is evident that he will waive his personal appearance at this hearing. Do you understand?

A. (by both applicants). Yes."

(Note. 1-4 relates to appellant Chin Chiu Chung; 1-5 relates to appellant Chin Chiu Fong.)

Discussing first the facts relating to the appellant Chin Chiu Chung, 1-4, we find a complete failure on the part of the Board of Special Inquiry to ascertain whether this subject desired a friend or relative present during the course of his examination. The foregoing quoted testimony shows that this subject was never given an opportunity to answer this question. This is an omission of an essential prerequisite required and established by law and regulation. Chin Chiu Chung was thereby denied a substantive right which is entitled to protection in a court of law.

In the case of Chin Chiu Fong, 1-5, the facts are somewhat different. This subject was asked if he

desired to have a friend or relative present during the course of his examination and he replied in the affirmative, naming a specific individual. The hearing was deferred for an indefinite period for the purpose of affording the applicants an opportunity to consult with their father, then a resident of New York City. Chin Chiu Fong gave the Board a plausible and reasonable excuse for failure to make the necessary arrangements prior to the date of the reconvened board. He stated the letter addressed to his father on the date of the deferred hearing had been returned only the day before and that he immediately addressed another letter to him requesting his advice. The Board of Special Inquiry gave no consideration to his prior request to have a friend present. They did not ask if he still desired to have that friend present. The record shows they arbitrarily waived his substantive rights.

The Supreme Court of the United States has held:

“The rules are designed to protect the interest of the alien and to afford him due process of law.
 * * * It was assumed in *Bilokumsky v. Tod*, 263 U.S. 149, 155, 44 S. Ct. 54, 56, 68 L.Ed. 221, that ‘one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.’ We adhere to that principle. For those rules are designed as safeguards against essentially unfair procedures.” *Bridges v. Wixon*, 65 S.Ct. 1443, 1452, 326 U.S. 135, 152.

Prior decisions of the Federal Courts dealing with the right to have a friend or relative present such as,

United States ex rel. Dong Yick Yuen v. Dunton, 297 F. 447 and *Stone ex rel. Colonna v. Tillinghast*, 32 F.2d 447, are not applicable to the present case. These decisions were based upon departmental regulations in effect at that time. The regulations were not mandatory prior to the recent change enacted in December 1946. They are at this time.

These decisions render full support to the appellants' contention that they have been denied a substantive right, and therefore, a fair hearing.

APPELLANTS WERE NOT GIVEN A FAIR HEARING AS REQUIRED BY THE "DUE PROCESS OF LAW" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is admitted that the decision of the immigration department is final and conclusive unless there has been a denial of a fair hearing, an abuse of discretion, or an error of law.

Quon Quon Poy v. Johnson, 47 S.Ct. 346, 347, 237 U.S. 352, 71 L.Ed. 680.

It has been said that a fair hearing of an alien's right to enter the United States means a hearing before the immigration officers "in accordance with the fundamental principles that inhere in due process of law."

Ex parte Petkos, 212 F. 275, 277.

When an applicant has not been accorded or properly advised of all of these rights there has been an unfair hearing.

United States ex rel. Waldman v. Tod, 289 F. 761, 764, 765.

If an alien has not been accorded the legal rights to which he is entitled under the statutes and rules of the department, *habeas corpus* is the remedy and if the procedure prescribed by law was disregarded, the respondent did not have a fair hearing in accordance with the rules of the department.

Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201, 52 L. Ed. 369.

The same rule was expressed by the Supreme Court in the case of *Kwock Jan Fat v. White*, 253 U.S. 454, 464, 40 S.Ct. 566, 570:

“It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which executive officers proceed to judgment.”

Applying other rules of decisions to the present facts we find substantial basis to support the appellants' contention that they have been denied “due process of law”. In the case of *Ex parte Soghanalian*, 2 F. (2d) 40, 42, the Court stated:

“Administrative officials may not ignore essential parts of the statutes they are administering.”

Similarly, the Supreme Court stated in the case of *Gegiow v. Uhl*, 239 U.S. 319, 36 S.Ct. 2, 60 L.Ed. 114, 118:

“* * * when the record shows that a commissioner of immigration is exceeding his powers, the alien may demand his release upon habeas corpus.”

Quoting from *Sibray v. U. S.*, supra, at page 798:

“Aliens must be deported according to law, and not according to men. This statute must be administered according to its terms and the rules established by the Commissioner General of Immigration. Those charged with the enforcement are not at liberty in any particular case, and for reasons that appeal to them at the moment, to set aside any of the rules on which the rights of aliens depend.”

The rules of malfeasance and nonfeasance apply to administrative officers. It has been said that:

“* * * when the administrative officers do something outside of the act or omit something required by the act, that judicial interference is warranted.”

Prentis v. Cosmas, 196 F. 372, 373.

Also see:

United States v. Williams, 190 F. 686, 687;

Ex parte Gregory, 210 F. 680, 687.

Failure of the Board of Special Inquiry to advise the appellant Chin Chiu Chung in accordance with the mandatory regulations of the department is a

denial of due process of law. This failure did not only result in an unfair hearing but was an arbitrary abuse of its discretion. The appellant Chin Chiu Fong should have been accorded a reasonable opportunity to consult with his father and make the necessary arrangements for the presence of a friend or relative. The Board was not justified in proceeding with his case until there had been a complete compliance with the regulations then in effect. Therefore, the same rules of law are applicable insofar as he is concerned. It is asserted that the Board's action clearly establishes a manifest disregard of a course of conduct established by law and regulation.

APPELLANTS ARE ENTITLED TO A HEARING DE NOVO.

It is concluded, therefore, that under the doctrine as stated heretofore, the appellants have been denied a substantive right guaranteed and protected by the Constitution.

The Board's manifested disregard of the fundamental principles which are protected by the Constitution is so flagrant that such conduct cannot be condoned under any interpretation of law. The arbitrary abuse of the discretionary power granted is so contradictory to the dictates of humanity that it justifies judicial interference. Without the protection of the Courts, intolerance by administrative boards of the rights that inhere in "due process of law" would be rampant.

The appellants are not entitled to release from the custody of the Immigration and Naturalization Service, since authority to determine admissibility is vested in that administrative body. Failure on the part of that service to comply with the prerequisites established by law and regulations makes any subsequent proceedings null and void.

It is asserted that the appellants should be granted a new, fair, and impartial hearing in accordance with law.

PRAYER.

Wherefore, appellants, Chin Chiu Fong and Chin Chiu Chung, pray that a writ issue unless the Immigration and Naturalization Service convenes a hearing *de novo* within twenty days after a decision in this proceeding.

Dated, San Francisco, California,
February 1, 1950.

JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
One of the Attorneys for Appellants.

No. 12,415

IN THE

United States Court of Appeals
For the Ninth Circuit

CHIN CHIU FONG and CHIN CHIU
CHUNG,

Appellants,

VS.

ARTHUR J. PHELAN, Acting District
Director of the Immigration and
Naturalization Service, San Fran-
cisco District,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

LLOYD E. GOWEN,

Assistant District Adjudications Officer,

Immigration and Naturalization Service,

630 Sansome Street, San Francisco 1, California,

On the Brief.

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PAUL P. O'BRIEN

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IN THE
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Appellants,

vs.

ARTHUR J. PHELAN, Acting District
Director of the Immigration and
Naturalization Service, San Fran-
cisco District,

Appellee.

BRIEF FOR APPELLEE.

FOREWORD.

The appellants arrived at the Port of San Francisco from China on December 15, 1948 applying for admission to the United States as United States citizens (Tr. p. 9), claiming to be the sons of Chin Yow Kin, a person whose United States citizenship had been conceded by the Immigration and Naturalization Service. (Tr. p. 10.) A Board of Special Inquiry hearing covering the two appellants was held on December 28, 1948, and subsequently. (Ex. A., pp. 88-47.) Al-

though the appellants had already been detained by the Immigration and Naturalization Service at 630 Sansome Street, San Francisco, for a period of thirteen days prior thereto, they then requested that the case be delayed until the father could be contacted. (Ex. A., p. 87.) The hearing was accordingly deferred and the Board of Special Inquiry was reconvened on January 7, 1949. (Ex. A., p. 85.) At this hearing the appellants had still received no word from their father. (Ex. A., p. 84.) However, during the recess of the case an appearance was noted by Edward Hong, an attorney at law in New York, N. Y., who stated that the parents would testify in New York, N. Y. He did not indicate a desire to be present at the Board of Special Inquiry here at San Francisco. (Ex. A., p. 84.)

Appellants do not urge in their appeal that they are in fact the sons of Chin Yow Kin. Neither do they urge that the conclusion of the Board of Special Inquiry was wrong in finding the appellants to be aliens and not the sons of the said Chin Yow Kin. Appellants base their appeal upon the sole ground that the Board of Special Inquiry failed to comply with provisions of law and regulations providing that immigrants may have a friend or relative present during a hearing before a Board of Special Inquiry. (Br. App., p. 4.)

In order to determine whether the appellants were granted a fair hearing in this respect, it is necessary to quote the entire preliminary portions of the hear-

ings. The introductory part of the hearings are as follows:

Hearing on December 28, 1948:

“TO APPLICANTS

Q. If at any time you should fail to understand the interpreter or to understand the meaning of any statement or question in the course of these proceedings you should so state at once. Do you understand?

A. By 1-4: Yes.¹

By 1-5: Yes.²

Q. What are all the names you have ever used or have ever been known by?

A. By 1-4: CHIN CHIU CHUNG, no others.

By 1-5: CHIN CHIU FONG, no others.

Q. State your native dialect. If you will testify in some other dialect explain why you will do so.

A. By 1-4: CANTON CITY dialect.

By 1-5: CANTON CITY dialect.

Q. Your right to enter the United States will be considered by this Board and all evidence in your behalf must be submitted at this hearing. You have the right to be represented in this proceeding by an attorney or by any other person admitted to practice before this Service or the Board of Immigration Appeals. Do you wish to be so represented?

A. By 1-4 and By 1-5: I desire to delay this case until I can write a letter to my father and see what he wants us to do.

¹“1-4” is shown in the heading of the hearing to refer to Chin Chiu Chung, the younger appellant. (Ex. A, p. 88.)

²“1-5” is shown in the heading of the hearing to refer to Chin Chiu Fong, the elder appellant. (Ex. A, p. 88.)

(If not) Q. Do you waive your right to representation by counsel in this proceeding?

A.

Q. You are informed that you or your qualified representative have the right in this proceeding to examine any witnesses offered in your behalf, to cross examine any witnesses called by the Government, to offer evidence material and relevant to any matter in issue, and to make objections which shall be entered on the record. Do you understand?

A. By 1-4: I understand.

By 1-5: I understand.

Q. You also have the right at this hearing to have a friend or relative present, who, if a witness, must have finished testifying. Do you wish to use this right?

A. By 1-5: I have a friend, CHEUNG YIN KUEY, who I would like to have present.

Q. Do you solemnly swear that the testimony you are about to give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

A. Yes (BY EACH APPLICANT).

Q. Have you any letters, documents or photographs which you wish to offer in support of your application for admission to the United States?

A. BY EACH APPLICANT: I have nothing but my testimony.

Q. You are informed that if you wilfully and knowingly give false testimony in the course of these proceedings, you may be prosecuted for perjury, the penalty for which is a fine of not more than \$2000 and imprisonment of not more than five years. Do you understand?

A. BY EACH APPLICANT: Yes.

Q. How long do you intend to remain in the UNITED STATES?

A. BY EACH APPLICANT: Permanently.

Q. Have either of you a passport of any nature?

A. BY EACH APPLICANT: No.

Q. Have either of you ever obtained an immigration visa from an American Consular officer?

A. Whatever I have, I have already presented to you.

Q. There are no immigration visas among any of the papers you have presented to this Service. Have you ever applied for a immigration visa from an American Consular officer?

A. BY EACH APPLICANT: No.

CHAIRMAN TO CHIN CHIU FONG:

Q. You have stated that you desire to have CHEUNG YIN KUEY present at the time you testify. What is his address?

A. I don't know his address. Probably my father knows his address.

Q. Would CHEUNG YIN KUEY be qualified to testify in your behalf as a witness?

A. I believe he is.

Q. To just what would he be able to testify?

A. *He knows me and my brother.* (Italics supplied)

Q. When did he come to the UNITED STATES?

A. I don't know when he came to the UNITED STATES, but I know he went back to CHINA in June of last year.

Q. When and where did you last see CHEUNG YIN KUEY?

A. I last saw him in my house in HONG KONG October of last year.

Q. How old a man is he?

A. I think he is a little over thirty.

Q. Are there any other persons in the UNITED STATES who would be willing to testify in your behalf as witness?

A. No others.

Q. Is there any person now living in the UNITED STATES with whom you were acquainted in CHINA?

A. BY EACH APPLICANT: Just my father and mother.

Q. Where is your mother living at this time?

A. BY EACH APPLICANT: She is now living in NEW YORK with my father.

Q. You have been here, at these quarters, for about two weeks. Have you made any attempt in that time to contact your father or mother?

A. BY 1-5: I have written once to my father, but I have not heard from him yet.

Q. Just how long do you desire to delay this hearing before you will be able to advise us whether or not you desire to be represented by an attorney or by any other person?

A. I shall notify you immediately after I receive word from my father.

Q. You are advised that it is the desire of this Service to complete these hearings as expeditiously as possible. For that reason you should attempt to contact your father either by airmail or telegram. Do you understand?

A. BY EACH APPLICANT: I understand.

Q. When this hearing is again resumed you should be in a position to advise this Board as to

whether your father and mother and CHEUNG YIN KUEY will appear here as witnesses in your behalf. Do you understand?

A. BY EACH APPLICANT: I understand.

Q. You are advised that this Board of Special Inquiry will be recessed in order to give you an opportunity to obtain advice from your father concerning the retention of Counsel. You should immediately let us know when you are ready to proceed with this hearing. Do you understand?

A. I understand. BY EACH APPLICANT.

Q. Have you understood the interpreter and all the questions asked you?

A. BY EACH APPLICANT: Yes.

Q. Have you any further statement to make at this time?

A. BY EACH APPLICANT: No.

BY CHAIRMAN:

This hearing is deferred.

January 7, 1949

H. H. CARSON REPLACES G. T. PATTERSON AS SECOND MEMBER.

BY MEMBER CARSON:

I have familiarized myself with all the testimony and evidence adduced thus far in these cases.

Interpreter, Stephen Louie

APPLICANTS CHIN CHIU CHUNG AND CHIN CHIU FONG RECALLED TO BOARD ROOM AND ADMONISHED THAT THEY ARE STILL UNDER OATH TO TELL THE TRUTH AND SUBJECT TO THE PENALTIES OF PERJURY.

CHAIRMAN TO APPLICANTS:

Q. Are you the same CHIN CHIU CHUNG and CHIN CHIU FONG who last appeared before this Board on December 28, 1948?

A. Yes.

Q. At that time, this Board was recessed in order to give you an opportunity to correspond with your father to find out what he wanted you to do in regard to retaining an attorney. Have you received any word from your father?

A. No.

BY CHIN CHIU FONG: I wrote a letter to my father on December 28, 1948. The last letter was returned to me yesterday for additional postage. I wrote to my father again yesterday.

Q. You are advised that this Service has received a letter from EDWARD HONG, Attorney at Law in NEW YORK CITY, entering his appearance as attorney in these cases and has stated that your parents will testify in NEW YORK CITY. The interpreter will now read you these letters, and each of you are requested to state if you are ready to proceed with your hearing at this time.

A. BY CHIN CHIU FONG: Yes.

BY CHIN CHIU CHUNG: Yes.

Q. Inasmuch as Attorney Edward Hong is in New York City, it is evident that he will waive his personal appearance at this hearing. Do you understand?

A. Yes. (BY BOTH APPLICANTS)."

(Ex. A, pp. 87-84.)

It will be noted that appellant "1-5", Chin Chiu Fong, is one year and one month older than appel-

lant "1-4", Chin Chiu Chung. (Ex. A, p. 88.) It was natural that he should state for both brothers who the witnesses were to be and who they desired to be present as a friend or relative. It will be noted that Chin Chiu Fong stated that Cheung Yin Kuey (the friend whom he desired to have present) would be able to testify as to both himself and his brother. (Ex. A, p. 86.) It is also worthy to note that Chin Chiu Fong, as the elder brother, was the one who was conducting the correspondence with the father. (Ex. A, p. 86.)

ARGUMENT.

Appellee concedes that regulations have the force and effect of law and for the purposes of this brief concedes that regulations must be given effect according to their plain and obvious meaning. However, the primary hypothesis as set forth on page 13 of appellant's brief that "failure of the Board of Special Inquiry to advise the appellant, Chin Chiu Chung, in accordance with mandatory regulations of the Department is a denial of due process of law" is not borne out by the record in this case. As a matter of fact, exactly the contrary appears. It is clearly shown that both appellants were present at the hearing on December 28, 1948, and that both were advised of the right referred to in the following language: "You also have the right in this hearing to have a friend or relative present who, if a witness, must have finished testifying. Do you wish to use this right?" (Ex. A, p.

87.) It is only reasonable and proper to conclude that the answer given by the elder appellant, Chin Chiu Fong, was on behalf of both appellants. This assumption is further borne out by the statement made by Chin Chiu Fong when questioned concerning Cheung Yin Kuey to the effect that the aforementioned witness "knows me and my brother". (Ex. A, p. 86.) The record further affirmatively shows that the appellants were given a reasonable fixed period of time within which to arrange for the presence of Cheung Yin Kuey. (Ex. A, p. 85.) This "friend" later appeared as a witness in the appellants' behalf. His testimony shows that he lives in Philadelphia, Pennsylvania. (Ex. C, Ex. 7, p. 1.)

While the rule concerning the presence of a friend or relative has been changed since 1929 it is of interest to note the opinion of the Circuit Court of Appeals for the First Circuit in the case of *Stone Ex Rel. Colonna v. Tellinghast*, 32 F. (2d) 442, in which the Court stated at page 449:

"The provisions contained in Rule 11, Subdivision B, Paragraph 1 that 'the alien may have a friend or relative present at the hearing before the Board of Special Inquiry is not mandatory and does not require the Board to so inform the alien'."

citing *United States v. Dunton* (C.C.A. 297 Fed. 447).

The sole purpose of a petition for a writ of habeas corpus is to inquire into the legality of the custody. (28 U.S.C. Ch. 153.) The scope of judicial review on

habeas corpus is extremely narrow. The administrative findings of fact are conclusive if supported by some evidence of probative value and are not open to attack merely by showing they are wrong.

Vajtauer v. Commissioner, 273 U.S. 103 (1927);

Tisi v. Todd, 264 U.S. 109, 133 (1924).

The courts on habeas corpus will determine a petitioner's charge that the administrative hearing was unfair.

Todd v. Waldman, 266 U.S. 113 (1924).

The Immigration statutes contemplate that administrative decisions, when made within the scope of statutory authority, shall be final. The only question to be determined by this Court is whether the applicants herein were granted a "fair hearing" as required by the due process clause of the Constitution of the United States. (Constitution, Fifth Amendment.)

Vajtauer v. Commissioner, *supra*.

Respondent submits, that unless it affirmatively appears that the appropriate immigration officer has acted in some improper or unlawful way, and has abused his discretion, his decision as to citizenship and admissibility must be deemed conclusive and is not subject to review by the Court.

Tang Tun v. Edsell, 223 U.S. 673, at p. 675.

CONCLUSION.

Appellee submits that appellants were granted a fair and impartial hearing and that no substantive rights guaranteed and protected by the Constitution were violated. It is respectfully urged that the decision of the Court below should be affirmed.

Dated, San Francisco, California,
February 24, 1950.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

EDGAR R. BONSALE,
Assistant United States Attorney,
Attorneys for Appellee.

LLOYD E. GOWEN,

Assistant District Adjudications Officer,
Immigration and Naturalization Service,
On the Brief.

No. 12416

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**CONSOLIDATED FREIGHTWAYS, INC., A CORPORATION,
APPELLEE**

(And Six Similarly Entitled Cases)

APPELLANT'S PETITION FOR REHEARING

H. G. MORISON,

Assistant Attorney General,

NEWELL A. CLAPP,

EDWARD H. HICKEY,

Special Assistants to the Attorney General,

ARMISTEAD B. ROOD,

Attorney, Department of Justice,

Attorneys for Appellant.

FILED

JAN 21 1950

PAUL P. O'BRIEN,

CLERK

In the United States Court of Appeals for the Ninth Circuit

No. 12416—Dec. 22, 1949

UNITED STATES OF AMERICA, APPELLANT

v.

CONSOLIDATED FREIGHTWAYS, INC., A CORPORATION,
APPELLEE

(And Six Similarly Entitled Cases)

APPELLANT'S PETITION FOR REHEARING

To the Honorable Judges of the Court:

Comes now the appellant, the United States of America, and petitions this honorable Court for a rehearing in the above-entitled causes on the Order of December 22, 1949, granting appellee's motion to vacate the extension orders entered by the Court on November 4 and 30, 1949, and dismissing the appeals of the United States after the record had been filed within the time allowed by the said extension orders. In support of this petition appellant assigns the following reasons:

1. Appellant filed the record on appeal within the period allowed by the Court rules including the extension ~~orders~~ which this Court properly granted to the Government by its valid and effective orders. The Court should stand by those orders

Appellee relies principally upon *United States v. Gallagher*, 151 F. (2d) 556, where this Court dismissed

the Government appeal on finding that "the record on appeal was not filed here within the 40-day period prescribed in Rule 73g of the Federal Rules of Civil Procedure or any valid extension thereof." (Also, the appellant there did not serve a designation of portions of the record in correct form.) The Court ruled that the "appropriate action" provided by Rule 73a was dismissal. Even assuming that such action was appropriate in that situation, that should not now govern, for the *Gallagher* facts were less favorable than the present situation. *Here the record was filed during the period granted deliberately by valid orders of this Court.*

First. The Court had jurisdiction of the appeals when it issued the orders. *Maloney v. Hammond*, 171 F. (2d) 225.

Second. It issued the extension orders upon the basis of the Hamilton affidavit, which explained the delay in a relatively unfavorable light (more unfavorably than subsequent investigation shows to have been warranted).

Third. The orders were *ex parte*, to be sure, but that in no way reduced their validity or injured the appellee. *In Re Pramer*, 131 F. (2d) 733. Courts grant such extensions constantly, and the orders, knowingly granted, were valid, effective, fair, equitable, customary, usual, accepted, and provident.

In *Leimer v. State Mutual Life Assurance Company*, C. C. A. 8, 1939, 106 F. (2d) 793, the Court of Appeals for the Eighth Circuit considered a less favorable situation, where the appeal was filed April 20 and extension was obtained for filing the record to

July 19. On August 8, upon *ex parte* application the appellant obtained a further extension from the Court of Appeals to November 1. Upon appellee's motion to dismiss, the Court said:

Conceding that the order of this Court was not in compliance with the Rules referred to and that it should not have been made without notice to appellee, if at all, *the fact remains that it was made* and that at the time it was made this Court had jurisdiction of the appeal and some sort of a partial record had been filed by the appellant within the time allowed by the lower court. * * * Under the circumstances, the motion of the appellee to dismiss the appeal will be denied without prejudice to a renewal of the motion after the expiration of the time granted by this Court to the appellant to complete here record on appeal. [Italics added.]

This was appropriate, and it serves as a sound precedent for the Court's "appropriate action" herein.

The Court should stand by its procedural extension orders granted deliberately, so as to avoid confusion and to conform to traditional American concepts of normal and stable judicial procedure. Unless a court will stand by its extension orders, once they have been granted, great uncertainty must ensue. For example, if the December 22 revocation shall be finally permitted to stand, the court will have acted detrimentally to the public interest and induced expenditures of time and public money in perfecting the appeal under the impression that when the court knowingly

granted the extension it did so deliberately and in the knowledge that the Government would rely thereon.

2. This Court should consider the realities of Government litigation when it formulates appropriate action

In determining "appropriate action" according to Rule 73a this Court has from time to time unnecessarily penalized the Government by dismissing its appeal because the record on appeal was delayed. This United States Court treats the United States Government more harshly in this respect than any other court in the land. The harsh impact on the Government, of course, is due to the great distances that separate such cities as Washington, San Francisco, and Portland, from each other. Compliance is more difficult for the Government here than in any other court. The distance both retards communication and opens the way for misunderstandings. (As an example of the former, we observe that it took 6 days for the Court Order of December 22 to reach the Department of Justice, although it was mailed directly by the Clerk. In the normal procedure, it would have taken longer because it would have gone through the Portland Office, being there considered and made the subject of a report to Washington, D. C., which would have consumed still more time.) The distance handicap which the conduct of Government appellate litigation entails in this Court is unique. The nearest parallel is the handicap of private Pacific Coast counsel in prosecuting appeals in the Supreme Court of the United States in the City of Washington. That Court, however, expressly

recognizes the added time required in conducting litigation from so great a distance. Its Rule 7 grants far Western counsel 5 extra days in which to file an opposition to a motion of the appellee to dismiss an appeal, while its Rule 10 makes a citation to the appellee when an appeal is allowed returnable in 40 days except when the counsel lives in California, Oregon, or another far Western State, in which event counsel receives 20 days additional because of the distance.

Apparently the Court has not been made aware of the difficulties that confront Government counsel on this score. Yet if at times delays caused by distance arouse understandable judicial impatience, it should be pointed out that under the careful procedure for review required by the Solicitor General before an appeal can be prosecuted occasional delays are unavoidable. This is particularly true when a lengthy transcript has to be analyzed. However, that procedure, with its occasional delays, is essential to prevent burdening the appellate courts with Government appeals except when founded on issues of genuine significance. Every effort is made by the Department of Justice in the conduct of all Government litigation on the Pacific Coast to adhere strictly to normal court time schedules, but experience indicates that failure does occur from time to time despite scrupulous attention to time limitations.

Therefore, it is vital to appellant that when this Court determines "appropriate action" in the spirit of Rule 73a, it take into consideration the special difficulties herein alluded to. It may be true, as

appellee points out (Appellee's memo., p. 8) that such considerations are not "our concern", that is to say, not *their* concern, but we do not think that it would be appropriate or statesmanlike for the Court to accept the second part of appellee's proposition—"nor that of this Court". The difficulties are real, and it is respectfully requested that this Court include this most important factor in its appraisal of diligence, excusability, and appropriate action.

The Federal Rules were intended to liberalize the procedure with regard to extensions of time for filing the record on appeal. Old mandatory requirements were expressly alleviated by the provision in Rule 73a which renders failure to comply therewith a non-jurisdictional defect. *Miller v. United States*, C. C. A. 7, 117 F. (2d) 256, *Burke v. Canfield*, App. D. C. (1940), 111 F. (2d) 526. The needs of the Government were specifically recognized in the amendments. See Notes of Advisory Committee on 1947 amendments to Federal Rules of Civil Procedure, Rule 73a, reading, in part, as follows:

In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through

the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its offices or agencies were parties.¹

¹ These suits were brought under the Tucker Act, which established the Departmental procedure, as follows:

“When the findings of fact and the law applicable thereto have been filed in any case as provided in section 763 of this title, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same.” (Act of March 3, 1887, c. 359, sec. 10; 24 Stat. 507; Act of Feb. 13, 1925, c. 229, sec. 8; 43 Stat. 940; 28 U. S. C. former Sec. 765.)

The foregoing portion was omitted from the 1948 revision of Title 28, U. S. C., “as unnecessary” in view of the established Departmental procedure and the control provided under 28 U. S. C., sec. 507. Similar general directions are contained in the Department’s instructions to United States Attorneys. See Reviser’s Notes to New Title 28, U. S. Code, sec. 2411.

The 40-day limitation is specifically not jurisdictional—it is directory. It is in the spirit of Rule 73a for the Court to make allowances for the difficulties experienced by Government counsel in getting the record filed, and not to preclude the public interest where the appellant had previously filed the record within the time allowed. The extension orders were in the spirit of Rule 73a, and their revocation violates it.²

3. Even if revocation of the extension orders were “appropriate” as against Government counsel it is not appropriate as against the public cause

The extension orders were in the spirit of the treatment universally accorded the Government as party litigant by its courts respecting statutes of limitation and laches.

It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. *United States v. Thompson*, 98 U. S. 486; *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125, 126; *Stanley v. Schwalby*, 147 U. S. 508, 514, 515; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 132; *Board of Commissioners v. United States*, 308 U. S. 343, 351. The same rule applies whether the United States brings its suit in its own courts or in a state court. *Davis v. Corona Coal Co.*, 265 U. S. 219, 222, 223. *United States v. Summerlin*, 310 U. S. 414, 416.

² “But a State cannot be expected to move with the celerity of a private businessman; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed.” Holmes, J., in *Virginia v. West Virginia*, 222 U. S. 17, 19.

The reasons for that policy were described by the Supreme Court as follows:

The rule that the United States are not bound and the reason for it are thus given in *United States v. Nashville, Chattanooga &c Railway*, 118 U. S. 120, 125: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." And this doctrine was declared by the court in *United States v. Insley*, 130 U. S. 263, 266, to be "applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."

To the same effect, Mr. Justice Story, in *United States v. Hoar*, 2 Mason, 311, 313, 314, said: "The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects, 1 Bl. Com. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public

officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments." *Stanley v. Schwalby*, 147 U. S. 508, 514.

The same considerations which produced that policy now also make the extension orders issued by this Court herein thoroughly "appropriate" in the administration of Rule 73a and render their revocation and the dismissal of the appeals quite inappropriate.

4. Under the standards of Rule 73a there was not an inexcusable lack of diligence

Appellee's case, as definitively restated in its memorandum on December 16, is founded upon the proposition that, however valid the extension orders may have been (so long as they remained outstanding), they were nevertheless improvidently granted, being *ex parte*, and should be retroactively vacated. We have pointed out, *supra*, that the *ex parte* nature of the extension orders did not make them invalid or improper—and that, having been granted deliberately and complied with by the appellant, they should stand. The following additional statements are submitted so as to inform the Court as to the merits of the delay.

Appellee argues principally that the extension orders should be vacated because of the delay in obtaining the transcript. It is true that the transcript was subjected to delay, which is now seen as having resulted from confusion caused by distance. The transcript was requested by letter from Washington dated as early as June 3, which was

before the final judgment. The request was renewed by letter of August 1, when the United States Attorney's office at Portland was specially requested to file notices of appeal. (This was in addition to the standard instructions for the preservation of appeals in the Department's Manual for United States Attorneys.) Another letter about the appeal was sent on September 5. On the other hand, it now appears that, with entire good faith, the Portland Office believed that the above requests did not authorize it to order the transcript and was waiting also for a bookkeeping form to arrive. The bookkeeping aspects were routine, and the supervising attorney in the Department at Washington forwarded to the administrative office of the Department an approval and routine request for the expenditure late in July. After receipt of a letter from Portland dated August 9 (and upon advice from the administrative office) the supervising attorney advised the trial attorney in Portland that the approval was clear and that he should go ahead and order the transcript and also mail in the appropriate authorization form to the Department. The record shows that the Department did receive the form from the Portland office and sent it with proper annotations back to Portland on September 28. The transcript had been ordered before then. There seems to have been some confusion and a delay, but it was not caused by any neglect or lack of diligence of the sort that would render the extension orders improper.

5. Appellee has not been injured or prejudiced by the extension orders

This is not a situation where the appellee has been injured or prejudiced in any way by the delay. Appellant designated the entire pleadings, evidence, findings, conclusions, and judgments, as is necessary when findings are sought to be set aside as clearly erroneous. Appellee has not been injured by not having more time to designate additional portions of the record; all portions were already designated by the Appellant.

This Court granted the extension of November 4 until November 30. It is our understanding that the extension of November 30 was requested and granted as a convenience in order to enable the Clerk of the District Court to complete certain photostating. Perhaps a filing could have been accomplished on November 30 if the Court had not granted the extension until December 20. At any event, Appellant has been in no way prejudiced by the extensions.

6. The appeals are meritorious

In the opinion of Government counsel the appeals are meritorious. Their preservation is essential to protect important public interests. The Appellant and the Court are entitled to have them heard.

The grounds for appeal are as follows:

First. That the District Court's findings and conclusions were clearly erroneous and should therefore be reversed under the rule of *United States v. United States Gypsum Co.*, 333 U. S. 364. They were contrary to (a) all the scientific evidence based on

measurement, experiment, and observation, and to (b) the scientific law of natural causality, and to (c) the unanimous experience in moving 19,658,000 identical items under all conditions throughout the world.

Second. That the District Court made an error of law in freeing the carrier from liability contrary to the terms of the contract of carriage and to the applicable law. The District Court found that bales were loaded while marking paint was wet, and this condition is taken as an “inherent vice” in the goods to exempt the carrier from its liability as insurer. But the exemption cannot be legally available because, even if it were an inherent vice³ the evidence of wet paint came from the carrier’s agent who testified that it came off on his clothes when he loaded the truck (Tr. p. 38). The carrier loses exemption because it approved the condition which (if it had been a vice) constituted contributory negligence. This loss of exemption is specifically provided under the contract of carriage and the law.

7. In any event, the Government should be fully heard before the public interest is foreclosed

The supervising attorney in Washington first learned of appellee’s motions to vacate the extension orders and dismiss the appeals a few days before the time set for hearing. Because of the distance separating the city of Washington from San Francisco and Portland, it was not possible to accumulate all

³ Actually it was not an inherent vice, because the “paint” was really lacquer which *cooled* in drying (Tr. p. 272).

the necessary information and formulate an adequate presentation. (For example, we did not receive a copy of the Hamilton affidavit until after the hearing.) We, therefore, urgently requested that a postponement be obtained. Late Friday afternoon, December 9, we learned that a postponement was not obtainable. The hearing was held the following Monday in San Francisco, when an Assistant United States Attorney from the San Francisco Office again requested postponement, which was again denied.

In view of the Court's extraordinary action of December 22, it would not seem unfair or inappropriate for the Government to receive a full opportunity to present its position. Obviously, the Court will be in a better position to evaluate all the circumstances and determine appropriate action under Rule 73a if it can hear the argument on the merits of the appeals and also on the extensions. In *United States ex rel Rempass v. Schlotfeldt*, C. C. A. 7, 123 F. (2d) 109, the court denied the appellees' motion to dismiss without prejudice to the right of its renewal at the hearing on the merits.⁴

CONCLUSION

Wherefore the appellant prays the Court for a rehearing on the Order of December 22, 1949, granting appellee's motion to vacate the extension orders entered by the Court on November 4 and 30, 1949, and dismissing the appeals of the United States after the

⁴ Appellee was not thereby prejudiced, because the court ultimately granted the renewed motion.

records had been filed within the time allowed by the said extension orders.

Respectfully submitted.

H. G. MORISON,
Assistant Attorney General,

NEWELL A. CLAPP,

EDWARD H. HICKEY,

Special Assistants to the Attorney General,

ARMISTEAD B. ROOD,

Attorney, Department of Justice,

Attorneys for Appellant.

CERTIFICATE

I hereby certify that the within petition for rehearing in my judgment is well founded and is not interposed for delay.

H. G. MORISON,
Assistant Attorney General.

No. 12417

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE HALL REED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

ERNEST A. TOLIN,

United States Attorney,

NORMAN W. NEUKOM,

*Assistant U. S. Attorney, Chief
of Criminal Division,*

PAUL MAGASIN,

Assistant U. S. Attorney,

600 United States Postoffice and
Courthouse Building, Los Angeles 12,

Attorneys for Appellee.

JAN 27 1950

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No. 12417

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE HALL REED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

Jurisdictional Statement.

A. The United States District Court for the Southern District of California had jurisdiction by virtue of 18 U. S. C. 724—(*Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation . . .*), now 18 U. S. C. 3651—(*Suspension of Sentence and Probation*) and 18 U. S. C. 725—(*Same; powers of probation officers, arrest of probationer*), now 18 U. S. C. 3653—(*Report of Probation Officer and Arrest of Probationer*), based upon a conviction under 18 U. S. C. 76—(*Falsely pretending to be a United States Officer*), now 18 U. S. C. 912—(*False Personation—Officer or Employee of the United States*).

B. The Chief Probation Officer, Probation System, United States Courts, District Court of the United States, Southern District of California, presented an official report on the conduct and attitude of the probationer, specifically referring to the passing of checks, and thereafter an Order was entered for the issuance of a bench warrant for the arrest of said probationer and for his appearance before the Court to show cause why his probation should not be revoked. [Clk. Tr. pp. 16, 17.] The defendant probationer was originally convicted on his pleas of *nolo contendere* to an Indictment charging him with falsely pretending to be a United States officer and employee, thereby obtaining funds. [Clk. Tr. pp. 11, 12.]

C. This Court has jurisdiction by virtue of 28 U. S. C. 1291—(*Final decisions of district courts*).

II.

Statement of Facts.

The pertinent facts relating to this appeal, as reflected by the record, indicate that the defendant probationer was originally convicted on Counts I and II of a five Count Indictment charging him with falsely pretending to be a United States officer and employee, thereby obtaining funds; his conviction was predicated on his pleas of *nolo contendere*, the remaining Counts of the Indictment having been dismissed on motion of the United States Attorney. Thereafter, defendant was sentenced to imprisonment for nine months on Count I, and to imprisonment for eighteen months on Count II, sentence on Count II to begin and run consecutively to the sentence imposed on Count I; but the execution of the sentence imposed on Count II was suspended, and defendant was placed on pro-

bation for a period of five years, conditioned that he would not violate the law, and further that he would report to the Probation Officer every sixty days. [Clk. Tr. pp. 11, 12.]

At probationer's request, the Probation Officer obtained an Order from the Court allowing the suspension of supervision of the defendant probationer so that probationer could reside in Mexico, supervision to be reinstated upon his return to the United States. [Clk. Tr. pp. 13, 14.] While out of the country, probationer issued checks payable at the Wells Fargo Bank and Union Trust Company in San Francisco, California. [Clk. Tr. p. 17, lines 8-17.] Evidence of the passing of these checks which were drawn on a non-existent bank account was introduced at the hearing for revocation of probation. [Clk. Tr. p. 24, lines 17 and 18.] The probationer was arrested in New York and returned to Los Angeles. [Clk. Tr. p. 21.] The Court thereupon found that the defendant had violated the conditions of his probation, and ordered revocation thereof. [Clk. Tr. p. 24.] Thereafter, the Court entered its judgment imposing the original suspended sentence on Count II. [Clk. Tr. p. 27, line 25, to p. 28, line 2.]

III.

Questions Presented by Appeal.

A. Whether or not the United States District Court for the Southern District of California had jurisdiction over the person or acts of probationer, the appellant herein.

B. Whether or not the Court had sufficient grounds for revocation of probation.

IV.

ARGUMENT.

A. The Court Did Not Err in Assuming Jurisdiction of the Probationer and Issuing Its Bench Warrant for His Arrest.

The Federal Probation Act, 18 U. S. C. 724, 725, (now 18 U. S. C. 3651, 3653, effective September 1, 1948), confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.

Burns v. United States, 287 U. S. 216 at p. 220.

Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor and not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to

place the defendant upon probation for such period and upon such terms and conditions as they may deem best.”

Burns v. United States, 287 U. S. 216, at pp. 220-221.

The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years.

The Probation Officer when directed by the Court must report to the Court with a statement of the conduct of the probationer. The Court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period, the probationer may be arrested, either with or without warrant, and thereupon he “shall forthwith be taken before the Court.”

Burns v. United States, 287 U. S. 216, at p. 221.

Appellant argues that he was illegally removed from New York City where proceedings were allegedly pending for his release. (App. Br. p. 4, lines 11-18.)

Probation is a system of tutelage under supervision and control of the Court having jurisdiction over the convicted person, having the record of conviction and sentence, records and reports of compliance with probation, and having aid of local probation officer under whose supervision defendant is placed. Thus, under this Section, such jurisdiction is not divided between the controlling Court and a Court of another district.

See:

Frad v. Kelly (C. C. A. 2, 1937), 89 F. 2d 866,
301 U. S. 681, 58 S. Ct. 188, 82 L. Ed. 282.

One who is on probation is not at liberty, but he is in custody and under the control of the Court having jurisdiction.

United States v. Koppelman (D. C. Pa. 1943), 53
F. Supp. 499.

The District Court had jurisdiction of the hearing for revocation of probation in this case, it not being disputed that this was the Court which originally sentenced the defendant and placed him on probation. [Clk. Tr. pp. 9-10.]

Defendant urges, in support of his appeal, that his acts were not under the jurisdiction of the Court, indicating in substance that the release from supervision meant a license to do as he pleased. This proposition is incorrect. The plain meaning of plain words, together with common sense, indicated that the Court's Order simply abated the supervision of the Probation Officer over the probationer, thus eliminating the necessity of making reports.

The Court, under the Statute, still had supervisory control of the probationer.

United States v. Moore (C. C. A. 2, 1939), 101 F.
2d 56, 57—Cert. den. 306 U. S. 664, 83 L. Ed.
1060, 59 S. Ct. 788;

Frad v. Kelly (N. Y. 1937), 89 F. 2d 867, 869, 302
U. S. 312, 82 L. Ed. 282, 58 S. Ct. 188;

Crowder v. Aderhold (C. C. A. 8, 1931), 46 F. 2d
357;

18 U. S. C. 3653.

B. The Court Had Sufficient Grounds for Revocation of Appellant's Probation, Such Action Being Solely Within Its Sound Discretion.

The only point of complaint that possibly could be urged on an appeal from an Order revoking probation is an alleged abuse of discretion on the part of the lower Court. Whether or not there has been an abuse is to be determined in accordance with familiar principles governing the exercise of judicial discretion. This implies conscientious judgment—not arbitrary action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge to a just result.

Burns v. United States, 287 U. S. 216, at pp. 222, 223;

Pritchett v. United States (C. C. A. 4, 1933), 67 F. 2d 244, 245.

Evidence of bad conduct may be sufficient for revoking probation although such conduct does not prove commission of a new crime.

Furrow v. United States (C. C. A. 4, 1931), 46 F. 2d 647, citing

Campbell v. Aderhold (D. C. Ga. 1929), 36 F. 2d 366.

The hearing in the present case involved an inquiry as to the passing of bad checks. Members of the Bar Association Committee for Indigent Defendants were available at the hearings which were called before the United States District Judge. [Clk. Tr. p. 18.]

At the final hearing, witnesses were sworn and evidence was presented. The Court, after receiving the

evidence and hearing arguments of counsel, found that defendant had violated the conditions of his probation. He ordered the probation revoked. [Clk. Tr. pp. 24-27.]

The Court did not abuse its discretion in the present case.

Appellant urges insufficiency of the warrant. (App. Br. p. 7, lines 29-30.) The law allows the arrest of the probationer, with or without a warrant, for a hearing in connection with his conduct on probation.

United States v. Moore, supra;

Burns v. United States, supra.

V.

Conclusion.

It is respectfully urged that the Judgment of the United States District Court for the Southern District of California revoking the probation of Appellant and imposing the serving of the original suspended sentence is valid and proper, and should, therefore, be affirmed.

Dated this 25th day of January, 1950.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

NORMAN W. NEUKOM,

*Assistant U. S. Attorney, Chief
of Criminal Division,*

PAUL MAGASIN,

Assistant U. S. Attorney,

Attorneys for Appellee.

No. 12418

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA STATE BOARD OF EQUALI-
ZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy
of the Estate of Exeter Refining Company,
Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED

JAN 5 - 1950

PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

FRED N. HOWSER,
Attorney General.

EDWARD SUMNER,
Deputy Attorney General,
600 State Building,
Los Angeles 12, Calif.

For Appellee:

ERNEST R. UTLEY,
633 Subway Terminal Bldg.
417 S. Hill St.
Los Angeles 13, Calif.

In the District Court of the United States for the
Southern District of California, Central Di-
vision.

In Bankruptcy No. 45355-Y

In the Matter of
EXETER REFINING COMPANY, a California
Corporation,

Debtor.

PETITION UNDER CHAPTER XI, SECTION
322 OF THE BANKRUPTCY ACT, AS
AMENDED

To the honorable judges of the above entitled court:

The verified petition of Exeter Refining Com-
pany, a California corporation, respectfully repre-
sents to the court as follows:

I.

That your petitioner now is, and at all times
herein mentioned has been, operating as a Cali-
fornia corporation, having its principal place of
business in the County of Los Angeles, State of
California, at 5843 Paramount Boulevard, Long
Beach, California, being engaged in the business
of refining and otherwise processing crude oils into
more refined petroleum products, including asphalt
and resinous substances. That petitioner is not a
municipal railroad, insurance or banking corpora-
tion, or a building and loan association, and is a
corporation entitled to file a petition under the
provisions of Chapter XI of the Bankruptcy Act,
as amended.

II.

That your petitioner has had its principal place of business and office in the County of Los Angeles, State of California, within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

III.

That no bankruptcy proceeding has heretofore been filed by your petitioner and no involuntary petition in bankruptcy is now pending against it.

IV.

That your petitioner believes that it is solvent but it is unable to pay its debts as they mature and proposes the plan of arrangement with its unsecured creditors as hereinafter set forth.

V.

That your petitioner alleges, as required by Section 324 of Chapter XI of the Bankruptcy Act, as amended:

(a) That your petitioner has no executory contracts insofar as it is now advised, except as shown in schedules.

(b) That a statement of affairs and schedules of assets and liabilities of your petitioner will be filed herewith or within the time directed by the above entitled court.

(c) That the Clerk's filing fee will be paid upon the filing of this petition.

(d) That your petitioner's assets are located within the County of Los Angeles, State of California.

That generally your petitioner's assets consist of various and sundry kinds of machinery and equipment suitable for the refining and storage of petroleum products, including a refinery and equipment essential to production of asphaltic and resinous materials; inventory of petroleum products on hand in all semi-finished and finished stages; transportation facilities necessary for transportation of products dealt in; and interest in the improvements on and profits from a marine terminal situated in the Los Angeles harbor area; miscellaneous supplies and other personal property necessary for the operation and conduct of the afore-described type of business.

That the estimated value of the assets of your petitioner, including the good will of the business, is the approximate sum of \$860,000.00, and its liabilities are in the approximate sum of \$860,000.00. That the estimated budget of the monthly expenses required to properly operate and carry on the business and commitments of your petitioner will not exceed the sum of \$60,000.

VI.

That your petitioners financial position became involved by reason of the fact that your petitioner

has recently been hampered by an absence of operating capital, which condition has been aggravated by the protracted maritime strike and by sales commitments at a fixed price in a rising market. The absence of operating capital resulted in an inability to purchase sufficient volume of petroleum products to process through petitioner's facilities. Petitioner at the present time has a broad and active market for all products it can produce at a substantial margin of profit, and petitioner is further possessed of purchase orders for its products in such volume that if the same can be met by the availability of sufficient operating capital to buy crude oil petitioner can operate to the benefit of the unsecured creditors. Your petitioner believes that legal proceedings will immediately follow unless this proceeding is filed forthwith, which legal proceedings will seriously jeopardize and interfere with petitioners ability to pay its just obligations. That a substantial benefit will result to the creditors of petitioner by and under an orderly liquidation of assets no longer needed by petitioner, and by and through the continued operation of petitioners business in which it is now engaged.

Debtors Proposed Plan of Arrangement

That your petitioner proposes the following plan of arrangement:

Article 1. That the creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A: Expenses of operation under plan of arrangement as may be authorized and allowed and ordered by the court.

Class B: Expenses of administration that may be allowed and ordered paid by the court pursuant to the provisions of Section 64-a of the Bankruptcy Act, as amended.

Class C: All creditors entitled to priority as provided in Section 64-a, subdivisions 2, 4, and 5 of the Act of Congress relating to bankruptcy, as amended.

Class D: Obligations as they mature to secured creditors in accordance with the terms of their contracts and/or as ordered by the court.

Class E: To pay pro-rata at such times as this Honorable Court may direct, and at intervals not to exceed six months, dividends upon unsecured creditors' claims until said claims are paid in full.

Article 2. That your petitioner now owns a three-quarter interest in the improvements and facilities situated on a marine terminal located in the Los Angeles Harbor area, together with a like interest in the proceeds to be derived from the operations thereof. That said asset is of the approximate value of \$150,000. That the Farmers and Merchants Bank of Los Angeles, California, a banking association, is possessed of an instrument executed by petitioner wherein petitioner repre-

sents that it will not transfer, hypothecate, or sell any interest in or to said asset so long as petitioner remains a debtor of said bank. That petitioner is informed and believes, that said instrument is a nullity and of no force or effect whatsoever and if the same was so decreed that petitioner could sell and/or hypothecate said asset as the circumstances then justified so as to secure further operating capital or further secure those unsecured creditors of your petitioner.

Article 3. That immediately upon the filing of this petition your petitioner will cause to be presented before this Honorable Court for determination the status of this asset, and if as a result thereof it be determined that the same may be hypothecated or sold that permission will be requested either to hypothecate or sell the same as the circumstances justify, for the purpose of carrying out this proposed plan of arrangement and for the further purpose of securing operating capital.

Article 4. That a receiver be appointed to take possession of all assets of petitioner and to handle and dispose of receipts and to conduct and operate such of the business of the above named debtor as may be necessary to operate under the supervision and direction of this Honorable Court, with authority to employ such agents, managers, and assistants, and the necessary labor as may be required to carry out debtors plan of arrangement.

Article 5. That said receiver appointed be authorized and empowered by the Honorable Court to issue receiver's certificate in the approximate amount of \$125,000.00 the proceeds from which, subject to the approval of this Honorable Court, be used to satisfy existing tax and labor claims, the balance thereof being made available for operating capital, which then available operating capital coupled with the present inventory of approximately \$104,000.00 in value would provide ample funds for the operation of debtor's business at a substantial profit.

Article 6. That said receiver appointed be authorized and empowered to currently discount accounts receivable of the debtor as the same become available so as to insure sufficient operating capital for the purchase of substantial volumes of unrefined petroleum products necessary for the conduct of debtor's business.

Article 7. That the receiver be permitted and authorized to open a bank account in the Bank of America National Trust and Savings Association, main Los Angeles offices, where all moneys received by said receiver, either from the sale or hypothecation of assets, collection of accounts receivable, discounting of accounts receivable, or from the operation of any business which this court may authorize the receiver to operate, shall be forthwith deposited and shall not be withdrawn from said bank except upon the counter signature of a Referee in Bankruptcy.

That the receiver will sign all checks and will furnish the Referee in Bankruptcy, if required so to do, with duplicate deposit slips of the moneys so deposited in order that the court may be fully advised at all times as to the condition of the receiver's bank account.

Article 8. That no property of the debtor be sold, and no accounts receivable be settled, for less than their face value without the approval of this Honorable Court and in the manner provided by the Bankruptcy Act, as amended.

Article 9. That the court immediately appoint an appraiser as contemplated by Section 333 of Chapter XI of the Bankruptcy Act, as amended, for the purpose of immediately preparing and filing an inventory and appraisal of the property of the debtor.

Article 10. That the court shall retain jurisdiction of the debtor's property and the operation of same until payment in full of all unsecured creditors claims.

Article 11. That in the event any claim is in controversy in respect to classification or amount due, the debtor under order of court may make such deposit in such manner as the court may direct in respect to said disputed claim and proceed to pay other creditors and be restored to possession pending a final determination of said disputed claim.

Article 12. That immediately upon filing of this petition your petitioner will request of the Exeter

Oil Company, Ltd., a Delaware corporation, the largest unsecured creditor of this debtor, that it waive its right to participate as an unsecured creditor of petitioner until fifty per cent of those claims of other unsecured creditors have been paid.

Article 13. That the debtor is advised that Chapter XI of the Bankruptcy Act, as amended, is the appropriate section of the Act under which to seek relief, and that your petitioner verily believes that its business can be operated in the manner herein designated, and if permitted to operate as proposed in this petition your petitioner can pay all its just debts in full within a period not exceeding two years and have its business remaining.

Article 14. That it is necessary for a speedy and proper administration of debtor's affairs and the equitable payment of creditors that all creditors and parties be enjoined from commencing or prosecuting any suit or foreclosure proceedings in any form or manner other than before the above entitled court, or without the permission of the above entitled court first had and obtained, or from prosecuting further any suit now pending without the permission of this Honorable Court.

Wherefore, petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act, as amended, that all creditors and other parties be enjoined from commencing or further prosecuting any suit in any form or conducting any sale or foreclosure proceedings affecting the property of

petitioner, or repossessing any property without order of this Honorable Court first had and obtained; that this Honorable Court place a receiver in possession of all petitioner's assets with full authority to operate and carry on debtor's business and affairs pending confirmation of debtor's proposed plan of arrangement, and that adjudication be stayed; that this Honorable Court permit the receiver herein to sell, hypothecate, or otherwise dispose of any property not necessary for the conduct of debtor's business or needed for the purposes in said plan of arrangement contemplated; that this Honorable Court authorize such receiver as may be appointed to open the necessary bank account or accounts for the purpose of properly conducting its business, and that funds may be withdrawn as in said plan provided, and to take such other steps and make such other orders herein as may be necessary for the protection of the debtor and all interested parties; and that your petitioner be granted such other and further relief as is just and proper in the premises.

EXETER REFINING
COMPANY,
a Corporation.

By /s/ HAROLD E. THOMAS,
Secretary.
Petitioner.

By /s/ JOHN D. MAHARG,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Harold E. Thomas, Secretary of Exeter Refining Company, a corporation, the petitioning debtor mentioned and described in the foregoing petition, hereby makes solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ HAROLD E. THOMAS.

Subscribed and sworn to before me this 16th day of October, 1947.

[Seal] /s/ GLADYS E. PADGETT,
Notary Public in and for said County and State.

[Endorsed]: Filed October 16, 1947.

— — —

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on October 16, 1947, before the said Court the petition of Exeter Refining Company, a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be re-

ferred to Benno M. Brink, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Exeter Refining Company, a corporation, shall attend before said referee on October 23, 1947, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Jacob Weinberger, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on October 16, 1947.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

[Endorsed]: Filed October 16, 1947.

[Title of District Court and Cause.]

OBJECTION TO CLAIM FILED BY STATE
BOARD OF EQUALIZATION IN THE
SUM OF \$3,926.36 AND NOTICE OF HEAR-
ING

Comes now, George T. Goggin, Receiver for the above-entitled debtor estate, and objects to the allowance of the claim of the State Board of Equalization filed in the above-entitled proceedings in the

sum of \$3,926.36, upon the ground that the said claimant has assessed a penalty of \$341.38 upon said claim of \$3,503.00 and has likewise made a charge that in the event the said tax is not paid by March 7, 1948, an additional penalty of \$350.30 will be added, and that said penalties are not allowable by virtue of the provisions of the Bankruptcy Act and the decisions with respect thereto.

Wherefore, your Receiver prays that the said claim of the State Board of Equalization be disallowed and that the same be reduced to a sum of \$3,503.00 plus interest to date of payment.

/s/ G. T. GOGGIN,

Receiver in Bankruptcy.

Notice is hereby given that a hearing on the objection to the foregoing claim will be had in the courtroom of the Honorable Benno M. Brink, Referee in Bankruptcy at 323 Federal Building, Temple and Spring Street, Los Angeles, California, on the 12th day of March, 1948, at the hour of 10 a.m. thereof.

Dated: This 5th day of March, 1948.

/s/ G. T. GOGGIN,

Receiver in Bankruptcy.

Affidavit of service by mail attached.

[Endorsed]: Filed March 6, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER RE CLAIM OF STATE
BOARD OF EQUALIZATION

Whereas, the Receiver's objections to the claim filed by the State Board of Equalization in the above entitled proceedings in the amount of \$3,926.36, plus interest in the sum of \$17.52 per month or fraction thereof after February 29, 1948, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, came on regularly for hearing on the 19th day of March, 1948, before the undersigned Referee; Ernest R. Utley appearing for and on behalf of said Receiver, and Fred N. Howser, Attorney General of the State of California, and Edward Sumner, Deputy Attorney General, appearing for and on behalf of the State Board of Equalization, the facts having been stipulated to in open court and the matter having been duly submitted for argument, the court being advised in the premises now makes the following:

Findings of Fact

I.

That the proceedings herein were filed on October 16, 1947, under and pursuant to Chapter XI of the Bankruptcy Act, as amended, and George T. Goggin was appointed and qualified as Receiver of the above entitled debtor's estate on October 17, 1947.

II.

That the claim of the State Board of Equalization for California Sales and Use taxes was duly filed within the time provided by law and that said claim was in the amount of \$3,926.36, plus interest in the sum of \$17.52 for each month, or fraction thereof, after February 29, 1948, to date of payment, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, and that no portion of said amounts were paid to said Board of Equalization by March 7, 1948.

III.

That the aforesaid sum of \$3,926.36 includes penalties in the total amount of \$341.38; that said penalties were imposed pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for failure to file Sales and Use Tax returns; that a portion of said penalties, namely, \$47.54, is attributable to the debtor's failure to file returns which were due prior to October 17, 1947, and that the remainder of said penalties, namely, \$293.84, is attributable to the failure to file sales tax returns for the period July 1, 1947, to October 16, 1947, said returns being due subsequent to October 17, 1947, the date of the appointment of the Receiver herein.

IV.

That the penalty in the sum of \$350.30 is imposed pursuant to Section 6565 of the Sales and Use Tax Law and is attributable to the Receiver's failure to

pay the sum of \$3,926.36, plus interest, by March 7, 1948, pursuant to the Notice of Determination under the California Sales and Use Tax Law dated February 6, 1948.

V.

That the Receiver herein duly filed objections to the allowance of the aforesaid penalties in the amounts of \$341.38 and \$350.30 on the ground that said penalties are not provable or allowable by virtue of the provisions of the Bankruptcy Act.

VI.

That as of the 7th day of March, 1948, a proposed plan of arrangement filed herein had not as yet been approved or passed upon by this Court.

Conclusions of Law

From the foregoing Findings of Fact the Court concludes as a matter of law:

I.

That the claim for the penalty in the sum of \$47.54 is an allowable claim under and pursuant to Section 307 of Chapter XI of the Bankruptcy Act, as amended, and should be paid by the debtor herein under the extension provisions of its plan of arrangement.

II.

That the claim for the penalty in the sum of \$293.48 is not an allowable claim under and pursuant to Section 307, Chapter XI, of the Bank-

ruptcy Act, as amended, and may not be paid by the debtor herein under the extension provisions of its plan of arrangement.

III.

That the aforesaid penalty in the sum of \$293.48 was not a contingent claim of the California State Board of Equalization within the purview of Section 307 of Chapter XI of the Bankruptcy Act, as amended, as of October 16, 1947, the date of filing of the proceedings herein.

IV.

That the claim for said penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

V.

That the claim for penalties in the amount of \$350.30 attributable to the Receiver's failure to pay by March 7, 1948, the amounts determined to be due to the California State Board of Equalization under the California Sales and Use Tax Law, pursuant to the Notice of Determination dated February 6, 1948, is not an allowable claim inasmuch as said penalties were imposed with respect to a taxable period prior to the appointment and qualification of said Receiver.

ORDER

It is therefore ordered, adjudged and decreed that the objections of the Receiver herein to the

claim of the California State Board of Equalization for penalties in the sum of \$47.54 be and the same are hereby overruled and the said claim for penalties in the sum of \$47.54 be and the same is hereby allowed and ordered paid on an extended basis pursuant to debtor's proposed plan of arrangement, and

It is further ordered, adjudged and decreed that the objections of the Receiver to the claim of the State Board of Equalization for penalties in the sums of \$293.48 and \$350.30, respectively, be and the same are hereby sustained and said claim for said penalties be and the same is hereby disallowed.

Dated: This 2nd day of December, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Approved as to Form:

.....
Attorney for Receiver.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.
Attorneys for Claimant.

[Endorsed]: Filed December 2, 1948.

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE PETITION
FOR REVIEW OF REFEREE'S ORDER

Your petitioner, the California State Board of Equalization, respectfully represents:

I.

That it has heretofore filed a claim in the above entitled proceedings for California Sales and Use Taxes, including penalties and interest, in the amount of \$3,926.36 plus additional penalties and interest from February 29, 1948.

II.

That the order of the Honorable Benno M. Brink, Referee in Bankruptcy, denying and disallowing a portion of said claim was signed and filed in the above court on the 2nd day of December, 1948.

III.

That the time within which said State Board of Equalization may petition for review of said Order will expire on the 12th day of December, 1948, pursuant to Section 39 (C) of the Federal Bankruptcy Act.

IV.

That due to counsel's absence from Los Angeles on official business, counsel was not informed of the signing and filing of the aforesaid Order until December 7, 1948.

V.

That due to the urgent press of other unforeseen business in the Attorney General's office, which will require counsel's exclusive attention from the date hereof to and including the first week in January, 1949, petitioner will not be able to file its petition for review of the aforesaid Order prior to the second week in January, 1949.

Wherefore, your petitioner respectfully petitions this Court for an Order extending to and including January 11, 1949, the time within which the petitioner may file its petition for review of the aforesaid Order dated December 2, 1948.

Dated: December 10, 1948.

CALIFORNIA STATE BOARD
OF EQUALIZATION,
Petitioner.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General,
Attorneys for Petitioner.

[Endorsed]: Filed December 10, 1948.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING PETITION FOR REVIEW OF REFEREE'S ORDER

Upon reading of the Petition for Extension of Time filed herein, and good cause existing therefor,

It Is Hereby Ordered that the California State Board of Equalization may have to and including January 11, 1949 within which to file its Petition for Review of the Order herein denying a part of the claim of said State Board of Equalization for taxes, penalties and interest due under the California Sales and Use Tax Law.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Dated: December 10, 1948.

[Endorsed]: Filed December 10, 1948.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Benno M. Brink, Referee in Bankruptcy:

The Petition of the California State Board of Equalization respectfully shows:

I.

Your petitioner, the California State Board of Equalization, is the duly created agency of the State of California administering the California Sales and Use Tax Law and has filed in the above entitled proceedings a Proof of Priority Claim for taxes as a charge against the within bankrupt estate under and pursuant to Section 64(a) of the Bankruptcy Act.

II.

That the receiver herein duly filed objections to the claim of petitioner on the ground that said claim includes penalties in the amounts of \$341.38 and \$350.30 and that said receiver prayed for an Order that said penalties be disallowed; that subsequent thereto, and on the 19th day of March, 1948, said objections to the claim of petitioner came on for hearing and that an Order was duly entered and filed in the above entitled court on the 2nd day of December, 1948 granting and sustaining the receiver's objections as to a portion of the aforesaid penalties and allowing the claim of petitioner with respect to the remaining portions of the penalties in words and figures as follows:

“Whereas, the Receiver's objections to the claim filed by the State Board of Equalization in the above entitled proceedings in the amount of \$3,926.36, plus interest in the sum of \$17.52 per month or fraction thereof after February 29, 1948, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, came on regularly for

hearing on the 19th day of March, 1948 before the undersigned Referee; Ernest R. Utley appearing for and on behalf of said Receiver, and Fred N. Howser, Attorney General of the State of California, and Edward Sumner, Deputy Attorney General, appearing for and on behalf of the State Board of Equalization, the facts having been stipulated to in open court and the matter having been duly submitted for argument, the court being advised in the premises now makes the following:

“Findings Of Fact

I.

“That the proceedings herein were filed on October 16, 1947 under and pursuant to Chapter XI of the Bankruptcy Act, as amended, and George T. Goggin was appointed and qualified as Receiver of the above entitled debtor's estate on October 17, 1947.

II.

“That the claim of the State Board of Equalization for California Sales and Use taxes was duly filed within the time provided by law and that said claim was in the amount of \$3,926.36, plus interest in the sum of \$17.52 for each month, or fraction thereof, after February 29, 1948, to date of payment, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, and that no portion of said amounts were paid to said Board of Equalization by March 7, 1948.

III.

“That the aforesaid sum of \$3,926.36 includes penalties in the total amount of \$341.38; that said penalties were imposed pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for failure to file Sales and Use Tax returns; that a portion of said penalties, namely \$47.54, is attributable to the debtor’s failure to file returns which were due prior to October 17, 1947 and that the remainder of said penalties, namely, \$293.84, is attributable to the failure to file sales tax returns for the period July 1, 1947 to October 16, 1947, said returns being due subsequent to October 17, 1947, the date of the appointment of the Receiver herein.

IV.

“That the penalty in the sum of \$350.30 is imposed pursuant to Section 6565 of the Sales and Use Tax Law and is attributable to the Receiver’s failure to pay the sum of \$3,926.36, plus interest, by March 7, 1948 pursuant to the Notice of Determination under the California Sales and Use Tax Law dated February 6, 1948.

V.

“That the Receiver herein duly filed objections to the allowance of the aforesaid penalties in the amounts of \$341.38 and \$350.30 on the ground that said penalties are not provable or allowable by virtue of the provisions of the Bankruptcy Act.

VI.

“That as of the 7th day of March, 1948 a proposed plan of arrangement filed herein had not as yet been approved or passed upon by this Court.

“Conclusions of Law

“From the foregoing Findings of Fact the Court concludes as a matter of law:

I.

“That the claim for the penalty in the sum of \$47.54 is an allowable claim under and pursuant to Section 307 of Chapter XI of the Bankruptcy Act, as amended, and should be paid by the debtor herein under the extension provisions of its plan of arrangement.

II.

“That the claim for the penalty in the sum of \$293.48 is not an allowable claim under and pursuant to Section 307, Chapter XI, of the Bankruptcy Act, as amended, and may not be paid by the debtor herein under the extension provisions of its plan of arrangement.

III.

“That the aforesaid penalty in the sum of \$293.48 was not a contingent claim of the California State Board of Equalization within the purview of Section 307 of Chapter XI of the Bankruptcy Act, as amended, as of October 16, 1947, the date of filing of the proceedings herein.

IV.

“That the claim for said penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

V.

“That the claim for penalties in the amount of \$350.30 attributable to the Receiver’s failure to pay by March 7, 1948 the amounts determined to be due to the California State Board of Equalization under the California Sales and Use Tax Law, pursuant to the Notice of Determination dated February 6, 1948, is not an allowable claim inasmuch as said penalties were imposed with respect to a taxable period prior to the appointment and qualification of said Receiver.

“Order

“It Is Therefore Ordered, Adjudged and Decreed that the objections of the Receiver herein to the claim of the California State Board of Equalization for penalties in the sum of \$47.54 be and the same are hereby overruled and the said claim for penalties in the sum of \$47.54 be and the same is hereby allowed and ordered paid on an extended basis pursuant to debtor’s proposed plan of arrangement, and

“It Is Further Ordered, Adjudged and Decreed that the objections of the Receiver to the claim of the State Board of Equalization for penalties in the sum of \$293.48 and \$350.30, respectively, be and the

same are hereby sustained and said claim for said penalties be and the same is hereby disallowed.”

That the Order of the Referee is erroneous for the following reasons:

A.

The Order is based on Conclusions of Law II and III which hold that the claim for penalties in the sum of \$293.48 is not an allowable claim under and pursuant to Section 307, Chapter 11 of the Bankruptcy Act, as amended, and specifically that said penalty in the sum of \$293.48 was not a contingent claim of the California State Board of Equalization within the purview of Section 307 of Chapter 11 as of October 16, 1947, the date of filing of the proceedings herein. The Order is further based on Conclusion of Law IV to the effect that the penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

This portion of the claim (namely, penalties in the sum of \$293.48) represents the penalty imposed by the California Sales and Use Tax Law as a result of the failure to file Sales and Use Tax returns for the period of taxpayer's operations July 1, 1947 to October 16, 1947, said returns being due under said Sales and Use Tax Law subsequent to October 17, 1947, the date of the appointment of the receiver herein. The amount of tax for said period, as well as the penalties which would be imposed if the return for said period were not filed within the time

provided for could have been computed on October 16, 1947 inasmuch as said tax and penalties are fixed percentages of the gross taxable receipts received by the taxpayer during the period in question. It is the position of the State Board of Equalization that the penalty represents a contingent debt of the debtor within the purview of Section 307 of the Bankruptcy Act.

It is the further contention of the California State Board of Equalization that said penalty should have been allowed as an expense of administration by virtue of the fact that the return was required to be filed subsequent to the appointment of the receiver herein and that the receiver was under a duty (28 U.S.C.A. 124a) to file all state tax returns and make payment of taxes due under state law during the period of his office.

B.

The Order is further erroneous in that it is based on Conclusion of Law V to the effect that the claim for penalties in the amount of \$350.30 attributable to the receiver's failure to pay by March 7, 1948 the amounts determined to be due the California State Board of Equalization under the California Sales and Use Tax Law pursuant to a Notice of Determination dated February 6, 1948 is not an allowable claim inasmuch as said penalties were imposed with respect to a taxable period prior to the appointment and qualification of said receiver. It is the position of the California State Board of

Equalization that it was the duty of the receiver (28 U.S.C.A. 124a) to pay all state taxes determined to be due under state law prior to the delinquency date and that inasmuch as the very accrual of the penalty is attributable to the receiver's failure to make timely payment establishes that the claim should, accordingly, have been allowed as an expense of administration.

It is to be noted further that the amount of this penalty could also have been computed on October 16, 1947 and that this penalty may also be classified as a contingent debt within the meaning of Section 307 of the Bankruptcy Act.

Wherefore your petitioner, feeling aggrieved because of such Order, prays that the same be vacated and set aside and that this court order that the petitioner's claim be allowed in its entirety.

Dated: January 11, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Atty. Gen.

Attorneys for California State Board of Equalization.

State of California,
County of Los Angeles—ss.

Edward Sumner being by me first duly sworn, deposes and says: That he is attorney for petitioner in the above entitled matter; that he has heard read

the foregoing petition for review and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, that he believes it to be true.

/s/ EDWARD SUMNER.

Subscribed and sworn to before me this 11th day of January, 1949.

/s/ VINCENT P. LAFFERTY.

FRED N. HOWSER,
Attorney General.

[Seal] By /s/ VINCENT P. LAFFERTY,
Deputy.

Affidavit of service by mail attached.

[Endorsed]: Filed January 11, 1949.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER RE CLAIM OF
STATE BOARD OF EQUALIZATION

To the Honorable Leon R. Yankwich, Judge of the
Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above entitled matter is pending under an order of general reference, do hereby certify to the following:

The California State Board of Equalization has duly filed its petition for the review of an order made in this matter by your Referee on December 2, 1948, in which he disallowed two items of penalty, in the respective sums of \$293.84 and \$350.30, which had been claimed by the said Board of Equalization.

The Proceedings

This is a proceeding under Chapter XI of the Bankruptcy Act which began on October 16, 1947. On October 17, 1947, George T. Goggin was appointed and qualified as receiver in the case and as such receiver, he had authority to and he did operate the business of the debtor.

The debtor's plan of arrangement in the matter was, in due time, confirmed. Essentially, the said plan of arrangement was a composition in that it proposed that the debtor would pay 50% of its unsecured debts in full settlement thereof. However, the plan provided that if any creditor so

elected in writing, prior to the confirmation of the plan, the debtor would pay the debt owing to such creditor in full in certain installments. Therefore, there were, in effect, two plans in one, a composition and an extension.

In the course of the proceeding the California State Board of Equalization filed its claim for \$3,926.36 which included sales taxes, interest and two penalty items of \$47.54 and \$293.48. The said claim also demanded the payment of further interest to the date of payment of the claim and a further penalty of \$350.30 if payment was not made by **March 7, 1948.**

No objection was made to the aforesaid sales taxes or interest, but the receiver did file objections to each and all of the aforesaid items of penalty. Payment of the said sales taxes and interest was made by the receiver subsequent to the aforesaid date of **March 7, 1948.**

The aforesaid penalty of \$47.54 was assessed for the failure of the debtor to file certain sales tax returns which were due prior to the date of the commencement of this proceeding.

The aforesaid penalty of \$293.84 was assessed for the failure to file sales tax returns for the period from July 1, 1947, to October 16, 1947, the date of the commencement of this proceeding, the said returns being due subsequent to October 17, 1947, the date of the appointment and qualification of the receiver herein.

The aforesaid penalty of \$350.30 was claimed for the failure of the receiver to pay the aforesaid sales taxes and interest by March 7, 1948.

The State Board of Equalization contends that all of the aforesaid penalties were prior tax obligations of the debtor or that, at least, they were contingent general unsecured debts of the debtor at the time this proceeding began on October 16, 1947. The said Board, in its petition for review, further contends that the said penalties of \$293.84 and \$350.30 were allowable as expenses of administration, since they accrued, so it is said, because of the failure of the receiver to file the returns and to make the payments which should have been filed and paid subsequent to his appointment and qualification.

After hearing the matter your Referee allowed the aforesaid penalty of \$47.54 as a general unsecured debt to be paid by the debtor under the extension provisions of its confirmed plan of arrangement and pursuant to the provisions of Section 307 of Chapter XI of the Bankruptcy Act. However, your Referee disallowed completely the remaining penalties of \$293.48 and \$350.30. It is from your Referee's order of disallowance of said penalties of \$293.48 and \$350.30 that this review is taken.

The Questions Presented

The questions presented by this review are set forth in detail on pages six and seven of the petition for review which is going up with this certificate.

The Evidence

There is no formal evidence to transmit, the facts in the matter being as they are hereinbefore set forth.

Referee's Findings of Fact, Conclusions of Law and Order

The original of your Referee's findings of fact, conclusions of law and order in this matter is going up with this certificate.

Papers Submitted

For the information of the Court the following papers are herewith transmitted:

1. Objection to Claim filed by State Board of Equalization in the sum of \$3,926.36 and Notice of Hearing, filed March 6, 1948.

2. Memorandum in Opposition to Objection to Claim filed by State Board of Equalization in the sum of \$3,926.36, plus additional interest, filed March 31, 1948.

3. Memorandum in re Receiver's Objections to Claim of State Board of Equalization, filed April 14, 1948.

4. Supplement to Memorandum in re Receiver's Objections to Claim of State Board of Equalization, filed April 26, 1948.

5. Findings of Fact, Conclusions of Law and Order re Claim of State Board of Equalization,

filed December 2, 1948.

6. Petition for Extension of time within which to file Petition for Review of Referee's Order, filed December 10, 1948.

7. Order Extending Time for filing Petition for Review of Referee's Order, filed December 10, 1948.

8. Petition for Review, filed January 11, 1949.

Respectfully submitted this 8th day of February, 1949.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed February 8, 1949.

United States District Court, Southern District of
California, Central Division

No. 45,355-Y

In the Matter of

EXETER REFINING COMPANY,
Bankrupt.

DECISION

The petitions of the California Department of Employment and the Board of Equalization to review the orders of the Referee, dated December 2, 1948, heretofore argued and submitted, are now decided as follows:

The said orders of the Referee, dated December 2, 1948, are, and each of them is, affirmed.

A study of the record leads me to the conclusion that the Referee's conclusions as to these matters, as stated in the Memorandum Opinion, dated April 14, 1948, are correct. Indeed, on April 21, 1949, I reached similar conclusions as to claims for penalties claimed by State tax agencies in the case of Alta Vineyards Co., No. 6371, Northern Division. The trend against saddling the bankrupt estate with penalties of any kind, under the mandate of Section 57(j) of the Bankruptcy Act is evidenced by the recent decision of the Supreme Court in *New York v. Soper*, 336 U. S. 328, disallowing interest on tax claims after date of bankruptcy.

A transcript of the oral opinion in the Alta Vineyards matter will be filed in this proceeding with this order.

Hence the ruling above made.

Formal orders to follow.

Dated this 22nd day of June, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

ORDER OF JUDGE ON PETITION FOR
REVIEW OF REFEREE'S ORDER

At Los Angeles in said district on the 20th day of October, 1949:

Upon the Petition for Review of the California State Board of Equalization filed the 11th day of January, 1949, upon the Certificate of the Referee dated the 8th day of February, 1949, and filed, and upon all proceedings had before the Referee as appears from his said Certificate, and upon hearing counsel for the parties, it is

Ordered that the Order of the Referee entered herein the 2nd day of December, 1948, disallowing tax penalties claimed by said California State Board of Equalization in the sums of \$293.48 and \$350.30 be and the same hereby is affirmed.

/s/ LEON R. YANKWICH,
Judge, U. S. District Court.

Approved as to form:

/s/ ERNEST R. UTLEY,
Attorney for Receiver.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Judgment entered Oct. 21, 1949.

Docketed Nov. 15, 1949.

[Endorsed]: Filed October 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the California State Board of Equalization, claimant in the above entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable Judge Leon Yankwich, entered on the 21st day of October, 1949, on petition for review of Referee's order disallowing tax penalties claimed by, said California State Board of Equalization in the total sum of \$643.78.

Dated: This 15th day of November, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for California State Board of Equalization.

[Endorsed]: Filed November 15, 1949.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to trans-

act business in the State of California, is held and firmly bound unto George T. Goggin, Receiver in Bankruptcy for Exeter Refining Company, a corporation, Debtor in the above-entitled matter, in the penal sum of Two Hundred Fifty and no/100 Dollars (\$250.00), to be paid to said George T. Goggin, Receiver in Bankruptcy for Exeter Refining Company, a corporation, his successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, the State Board of Equalization of the State of California is about to take an appeal to the 9th Circuit Court of Appeals from an Order made and entered on October 21st, 1949, by the United States District Court for the Southern District of California, Central Division, in the above-entitled action, affirming the Order of the Referee entered December 2nd, 1948, disallowing tax penalties by the California State Board of Equalization.

Now, Therefore, if the above-named Appellant, the State Board of Equalization of the State of California, shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this ob-

ligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 14th day of November, 1949.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND.

By /s/ ROBERT E. HUNTER,
Attorney in Fact.

Attest

/s/ S. M. SMITH,
Agent.

Examined and recommended for approval as provided in Rule 8.

/s/ EDWARD SUMNER,
Attorney.

Approved this day of, 1949.
.....,
Judge.

State of California,
County of Los Angeles—ss.

On this 14th day of November, 1949, before me,

Theresa Fizgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert E. Hunter, known to me to be the Attorney-in-Fact; S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] /s/ THERESA FITZGIBBONS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 3, 1950.

[Endorsed]: Filed November 15, 1949.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant, California State Board of Equalization, claimant in the above-entitled matter, through counsel, hereby designates the entire record before the District Court, including all the

papers, pleadings and other documents certified to the District Court by the Honorable Benno M. Brink, Referee in Bankruptcy, with his Certificate on Petition for Review of his order of December 2, 1948, disallowing two items of penalty, in the respective sums of \$293.48 and \$350.30, and totaling \$643.78, which had been claimed by said California State Board of Equalization.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled court transmit all the original papers in the file dealing with the action or the proceedings in which the appeal has been taken, including the notice of appeal and this designation.

Dated at Los Angeles, California, this 15th day of November, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 15, 1949.

In the District Court of the United States for the
Southern District of California, Northern Di-
vision

No. 6371

In the Matter of
ALTA VINEYARDS COMPANY, a Corporation,
Debtor.

RULING OF THE COURT ON CLAIMS OF
THE COUNTY OF SONOMA AND THE
COUNTY OF FRESNO, OBJECTED TO
BY THE TRUSTEE OF THE DEBTOR

In Proceedings for the Reorganization of a
Corporation

Fresno, California, April 21, 1949

Honorable Leon R. Yankwich, Judge Presiding.

Appearances:

For the Trustee, Earle M. Jones:

SAMUEL F. HOLLINS, ESQ.,

For certain creditors:

DAVID S. DAVIS, ESQ.,

For the Counties of Fresno and Sonoma:

HERBERT W. HARRINGTON, ESQ.

The Court: I am ready to rule now by sum-
ming up the argument in this manner:

That the source of liability of the Trustee for
the taxes is in Section 271 of the Bankruptcy Act
of 1938, which makes him liable for taxes owing

to any state from the debtor, within one year from the date of the filing of the petition. Then taxes which are due from him, after the filing of the petition, while he is in possession and control of the property. Sections 397, 523, and 630 merely confirm this right.

It is also made his duty under the law to pay taxes resulting from the operation of the business. We start with the proposition that the taxes claimed here are not taxes resulting from the operation of the business, but they are property taxes. They are not license taxes, nor are they taxes based upon income, and for that reason the case of *Boteler vs. Ingels*, 308 U.S. 57, does not apply.

In the above case the court was confronted with the proposition that the trustee had continuously operated unregistered and unlicensed vehicles on the California state highways. Tender of fees without accrued penalty was rejected by the State. The trustee did not obtain a license, and did not pay a fee for the renewal. Therefore, the question was whether he was liable for penalty, and the court held that he was, and held that Section 57 (j) did not apply because it was not a tax on which a claim could be filed. The court says:

“If businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty.”

And the court concludes that if the trustee operates a business he is subject to the same rule.

Then we come to the case of *In re Knox-Powell-Stockton Co.*, 100 Fed. (2d) 959. As I read

that case, it merely means this: that where, at the time the trustee took over, a penalty has already attached for the delinquency, as to the lien which had accrued before adjudication, the court wanted the penalty as well as the taxes proper, and that therefore the trustee was bound to pay that, although the date of the accrual of taxation preceded the adjudication.

However, Section 57 (j) specifically provides that there shall be no liability for penalties arising from debts owing to the United States or any state. That section is carried over and becomes a part of the reorganization chapter, and is a strict inhibition against the assessment of penalties against the trustee for the nonpayment of the tax.

To impose that obligation upon the trustee would be to force the trustee to borrow money when he does not have the money in his hands or in the registry of the court with which to pay. Clearly the Congress, in making the provision, intended to relieve the properties in reorganization in bankruptcy of such penalties, realizing that such a possible situation would arise. It would be unfair for the State to claim its pound of flesh when he did not have the money.

This is not a concern operating for profit, but a sick business, trying to liquidate. It would become unrealistic to subject the trustee to a penalty, and when they wrote that section they had in mind a situation where the trustee could not pay the taxes.

The answer is, that the State of California and the United States Government, under the judicial process, have taken over a sick business. For what benefit? Not for its own benefit, but for the creditors. Therefore, they are entitled to a different consideration at the hands of the Congress than a private person. At the same time, the Congress was fair by making it the obligation of the trustee to pay taxes which resulted from the operation of the business.

I do not think that Section 106 of the statute, which defines debt, excludes the specific non-liability for penalty. In other words, a general provision is not sufficient to deprive the trustee of the benefit of the specific provision which exempts him from liability for penalty, and the section of the Act specifically included in 57 (j) is applicable to the situation.

So the question can be summed up in this manner: that the Receiver is liable for taxes claimed by both counties, which have arisen since his appointment, or those which were assessed subsequent to his appointment.

The Court finds specifically that the estate was insolvent, which means, as of the date of such finding, the debtor is not in a position to pay his debts; that his assets, at a proper valuation, were not sufficient to pay his debts.

Under the circumstances we are confronted with this question: whether the Receiver should be liable for the payment of penalty. I am satisfied that Section 57 (j) applies, and the Receiver is not

liable for the payment of the penalty, and that it provides for the nonpayment of exempt taxes for actual losses which have accrued by reason of his failure to pay. Which evidences to my mind that the Congress intended to be fair as to tax penalties, and to protect them against the willful acts of the Trustee and also to protect them against loss for the non-willful acts of the Trustee by providing they should be compensated for actual losses.

The Trustee is under the jurisdiction of the court. The motivation is not there, and while you are still liable for taxes, it is unreasonable and unfair to charge him with penalties. So the philosophy of the Bankruptcy Act, and the relation between the court and all estates, all bespeak a reasonable interpretation of the provision which exempts the Trustee from penalty.

To sum up, I would say I would not allow a penalty against a receiver or trustee resulting from the ordinary operation of the estate, unless the Congress says specifically what shall apply and what shall not apply.

I hold that the County of Fresno and the County of Sonoma are entitled merely to the actual tax for the portion of those claims which were assessed after the Trustee took office.

As to the penalty for the prior period, they are not entitled to it, because they have not claimed the lien, and I will hold them strictly to the claim of lien. It is a rule of bankruptcy that a person entitled to a preferred position must make the claim.

They did not claim it, and not having done so, and the time for the filing of the claim having expired, no permission has been asked of the court to file an amended claim, and it would be unfair at this time to saddle the estate with the lien, carrying penalty.

For the record, I will refer again to the opinion *In re Owl Drug Co.*, 21 Federal Supplement 907, as indicating my view, that in bankruptcy and in reorganization under the chapter, this tax statute, and obligation to pay, should be construed strictly against the taxing body. And even in that case I held, as against the Government of the United States, they were not entitled to receive an income tax on income derived by the trustee, because the statute, which is also involved here, calls for an income tax only from the operation of the business. I held in that case that the trustee had liquidated the business; that he was not operating the drug-store, but merely held in the bank over a million and a half dollars from which he derived interest, and he did not have to pay an income tax on the interest.

In that case, the trustee had actually paid one or two installments, and I forbade him, as an officer of the court, from paying the remainder, on the ground that the United States was not entitled to receive it.

So, gentlemen, I have given you the benefit of my prior experience and knowledge in these matters. I have considered the points you have urged, and have indicated why the issue upon which chief

reliance is made for the exaction of the penalties can be distinguished, and why, in my view, not only the just and equitable, but the limit of the tax claimed is the limit I have indicated, namely, the basic claim without penalty.

I will therefore sustain the objection of the Trustee to the claims to this extent only; that is, the money claimed as penalties and interest over and above the basic claims.

To put it differently, the claim of Sonoma County will be allowed in the total sum of \$14,399.01.

The claim of Fresno County will be allowed in the sum of \$38,559.08.

And to that extent, each of these claims will be allowed as a preferred claim under the Act.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 20th day of May, A.D. 1949.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64, inclusive, contain a full, true and correct copy of Petition Under Chapter XI, Section 322, of the Bankruptcy Act, as Amended; and the original Approval of Debtor's Petition and Order of Reference Under Section 322 of the Bankruptcy Act; Referee's Certificate on Petition for Review of Order re Claim of State Board of Equalization; Objection to Claim Filed by State Board of Equalization in the Sum of \$3,926.36 and Notice of Hearing; Memorandum in Opposition to Objection to Claim Filed by State Board of Equalization in the Sum of \$3,926.36 Plus Additional Interest; Memorandum in re Receiver's Objections to Claim of State Board of Equalization; Supplement to Memorandum in re Receiver's Objections to Claim of State Board of Equalization; Findings of Fact, Conclusions of Law and Order re Claim of State Board of Equalization; Petition for Extension of Time Within Which to File Petition for Review of Referee's Order; Order Extending Time for Filing Petition for Review of Referee's Order; Petition for Review; Decision; Reporter's Transcript of Oral Opinion in Alta Vineyards Company Case; Order of Judge

on Petition for Review of Referee's Order; Notice of Appeal; Undertaking for Costs on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7th day of December, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12418. United States Court of Appeals for the Ninth Circuit. California State Board of Equalization, Appellant, vs. George T. Goggin, Receiver in Bankruptcy of the Estate of Exeter Refining Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 8, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12418

In the Matter of

EXETER REFINING COMPANY, a Corpora-
tion,

Debtor.

STATEMENTS OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, California State Board of Equaliza-
tion, intends to rely on appeal on the following
points:

1. The District Court and the Referee erred in sustaining the objections of George T. Goggin, Receiver for the above-entitled debtor estate, to the claim of the California State Board of Equalization for penalties imposed under the California Sales and Use Tax Law and amounting to \$643.78.

2. The District Court and the Referee erred in refusing to allow a portion of the penalties referred to in the preceding paragraph, namely, penalties amounting to \$293.48, either as a contingent claim pursuant to Section 307, Chapter XI, of the Bankruptcy Act as amended, or as a proper expense of administration by virtue of the fact that the said penalties in the sum of \$293.48 are attributable to the failure of the Receiver herein to file returns due under the California Sales and Use

Tax Law subsequent to the appointment of said Receiver.

3. The District Court and the Referee erred in ruling that the aforesaid penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

4. The District Court and the Referee erred in failing to allow the claim of the California State Board of Equalization for the balance of the penalties referred to in paragraph 1 above, namely, the sum of \$350.30, either as a contingent claim pursuant to Section 307, Chapter XI, of the Bankruptcy Act as amended or as an expense of administration, said penalty being attributable to the Receiver's failure to make timely payment of taxes under the California Sales and Use Tax Law subsequent to said Receiver's appointment although the period during which said taxes accrued terminated prior to the appointment of the said Receiver.

5. The District Court and the Referee erred in failing to allow the claim of the California State Board of Equalization for the aforesaid penalties, namely, \$293.48 and \$350.30, respectively, as a proper claim against, and obligation of, the Receiver herein pursuant to the provisions of 28 U.S.C.A. 960 (formerly 28 U.S.C.A. 124a).

6. The District Court and the Referee adopted erroneous conclusions of law which were and are

contrary to the laws of the State of California, as well as the laws of the United States, and to judicial decisions of State and Federal Courts.

Dated: December 8, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for the California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 10, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF
RECORD TO BE PRINTED

Appellant, California State Board of Equalization, claimant, hereby designates the entire record and all of the proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal and appellant hereby requests that the entire record and all of the proceedings and evidence be printed.

Dated: December 8, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 10, 1949.

No. 12418.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate
of EXETER REFINING COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

FEB 4 - 1930

FRED N. HOWSER,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

EDWARD SUMNER,

Deputy Attorney General,

600 State Building, Los Angeles 12,

Attorneys for Appellant.

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No. 12418.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,
Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate
of EXETER REFINING COMPANY,
Appellee.

APPELLANT'S OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

Exeter Refining Company, a California corporation (hereinafter referred to as "Exeter"), filed its Petition under Chapter XI of the Bankruptcy Act with the District Court of the United States, for the Southern District of California, Central Division, on the 16th day of October, 1947 [Tr. 2-12], the United States District Court as a court of bankruptcy having jurisdiction of this matter pursuant to the Act of July 1, 1898, as amended. (Chapter 541, Sections 1 and 2, 30 Stat. 544, 545, as amended; United States Code, Title XI, Chapter 1, Section 1, and Chapter 2, Section 11.) On the same day said Petition was

approved by the Honorable Jacob Weinberger, Judge of said Court, and the matter referred to Benno M. Brink, Esq., one of the Referees in Bankruptcy of said Court. [Tr. 12, 13.] Thereafter, and within the time provided by law, the State Board of Equalization of the State of California duly filed its Proof of Claim for California Sales and Use Taxes in the sum of \$3,926.36, plus interest in the sum of \$17.52 for each month or fraction thereof after February 29, 1948, to date of payment, plus an additional penalty in the sum of \$350.30 if payment were not made by March 7, 1948. [Tr. 16.]

On March 6, 1948, appellee Receiver filed Objection to Claim Filed by State Board of Equalization in the Sum of \$3,926.36 and Notice of Hearing. [Tr. 13-14.] On December 2, 1948, the Referee below filed Findings of Fact, Conclusions of Law and an Order sustaining the objections of appellee Receiver to the claim of the California State Board of Equalization for penalties in the sums of \$293.48 and \$350.30, and allowing the balance of the claim in full. [Tr. 15-19.] On December 10, 1948, appellant filed a Petition for Extension of Time Within Which to File Petition for Review of Referee's Order. [Tr. 20-21.] On the same day the Referee below filed his Order extending appellant's time within which to file its Petition for Review to and including January 11, 1949. [Tr. 22.] Appellant's Petition to review the aforesaid Order of the Referee sustaining appellee Receiver's objection to the claim of appellant for penalties in the sums of \$293.48 and \$350.30 was thereafter duly filed by appellant

on January 11, 1949. [Tr. 22-31.] On February 8, 1949, the Referee below filed his Certificate on Petition for Review of Order re Claim of State Board of Equalization, said Certificate being addressed to the Honorable Leon R. Yankwich, Judge of the District Court. [Tr. 32-36.] On June 22, 1949, the Honorable Leon R. Yankwich, Judge of the United States District Court, Southern District of California, Central Division, filed a Memorandum Decision affirming the Order of the Referee below, formal Order to follow. [Tr. 36-37.] On October 21, 1949, the formal Order of Judge on Petition for Review of Referee's Order was duly entered and filed. [Tr. 38.]

Within the time allowed by law, and in accord with the Rules of this court, appellant filed its Notice of Appeal from the Order of the Honorable Leon R. Yankwich affirming the Order of the Referee below [Tr. 39]; Undertaking for Costs on Appeal [Tr. 39-42]; Appellant's Designation of Record on Appeal [Tr. 42-43]; Statements of Points Upon Which Appellant Intends to Rely [Tr. 53-55]; and Appellant's Designation of Record to be Printed. [Tr. 56.]

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act (Act of July, 1898, as amended, Chapter 541, Secs. 24, 25; 30 Stat. 533, as amended; U. S. Code, Title XI, Chap. 4, Secs. 47 and 48). Appellate jurisdiction in this matter vested in the Court of Appeals upon the filing on November 15, 1949, of the Notice of Appeal, the amount involved being in excess of \$500.00.

II.

Statement of the Case.

This appeal is from an Order of the District Court dated and entered October 21, 1949, affirming the Order of the Referee in Bankruptcy dated and filed December 2, 1948.

The facts in this case are succinctly set forth in the Referee's Certificate on Appellant's Petition for Review and are set forth at this point solely for the convenience of the Court. As outlined in that Certificate, Exeter filed its Petition under Chapter XI of the Bankruptcy Act on October 16, 1947. The Petition was approved that day and the matter referred to the Referee below. On October 17, 1947, George T. Goggin was appointed and qualified as Receiver in Bankruptcy of Exeter's estate. [Tr. 15, 32.] As the duly appointed Receiver in Bankruptcy, appellee had authority to operate the business of the debtor and did so. [Tr. 32.] In the course of the proceeding, prior to March 6, 1948, and within the time provided by law, appellant duly filed its proof of claim for taxes, interest and penalties due under the California Sales and Use Tax Law in the amount of \$3,926.36, plus additional interest in the sum of \$17.52 for each month or fraction thereof after February 29, 1948, to date of payment, plus an additional penalty in the sum of \$350.30 if payment of the aforesaid taxes, penalties and interest were not made by appellee to appellant by March 7, 1948. [Tr. 16, 33.] Appellee, however, did not make payment of the aforesaid taxes, interest and penalties included in the sum of \$3,926.36 by March 7, 1948 [Tr. 16, 33.] To the contrary, on March 6, 1948, appellee Receiver filed objections not only to the penalties included in the aforesaid claim for \$3,926.36 but also to the penalty in the sum of \$350.30.

As of March 7, 1948, a plan of arrangement under Chapter XI of the Bankruptcy Act had not as yet been approved or passed upon by the District Court [Tr. 17] although subsequent to that date a plan of arrangement providing for an extension as well as a composition was duly confirmed [Tr. 32-33] and appellee did pay to appellant the aforesaid tax principal and interest.

No question relating to the allowance of tax principal or interest is present in this appeal. [Tr. 33.]

The penalties included in appellant's claim for \$3,926.36 amounted to \$341.38 and consisted of two penalty items, namely, \$47.54 and \$293.48 [Tr. 14, 33], and it is apparent, therefore, that three penalty items were in fact originally objected to by appellee. The nature of each penalty item may succinctly be described as follows:

First Penalty Item Amounting to \$47.54: This penalty was assessed by appellant pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for Exeter's failure to file sales tax returns which were due prior to the commencement of the instant Chapter XI proceedings. [Tr. 16, 33.]

Second Penalty Item Amounting to \$293.48: This penalty was assessed by appellant pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for failure to file sales tax returns for the period July 1, 1947, to October 16, 1947, the date of the commencement of the instant Chapter XI proceedings, said returns being due subsequent to October 17, 1947, the date appellee, George T. Goggin, was duly appointed and qualified as Receiver of Exeter's estate. [Tr. 16, 33.]

Third Penalty Item Amounting to \$350.30: This penalty was assessed by appellant pursuant to the provisions of Section 6565 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California, and is attributable to appellee's failure to pay the sum of \$3,926.36, plus interest, by March 7, 1948, as required by appellant's Notice of Determination under the California Sales and Use Tax Law dated February 6, 1948. [Tr. 16, 17, 34.]

The Referee below allowed the first penalty item amounting to \$47.54 as a general unsecured debt to be paid by the debtor under the extension provisions of its confirmed plan of arrangement pursuant to the provisions of Section 307 of Chapter XI of the Bankruptcy Act, and his ruling in that respect was affirmed by the Order of the Honorable Leon R. Yankwich dated October 21, 1949, and is not involved in this appeal. [Tr. 17, 34, 36-37, 38.]

The second and third penalty items were disallowed by the Referee and his ruling in that respect was affirmed by the Order of the Honorable Leon R. Yankwich filed and entered October 21, 1949. [Tr. 17-19, 34, 36-38.] This appeal is taken from the Order of the District Court affirming the Referee's disallowance of the second and third penalty items referred to above.

III.

Specification of Errors.

1. The penalty items of \$293.48 and \$350.30 for failure to file sales tax returns and make timely payment of amounts due under the California Sales and Use Tax Law, respectively, should have been allowed as expenses of administration inasmuch as both the filing of said returns and payments of amounts due under the California Sales and Use Tax Law were not required until subsequent to the appellee Receiver's appointment and qualification. Being attributable to omissions on the part of appellee Receiver, said penalties should have been allowed as proper claims against and obligations of appellee Receiver pursuant to the provisions of 28 U. S. C. A., Section 960.

2. In any event, said penalty items should have been allowed as contingent claims pursuant to Section 307 of Chapter XI of the Bankruptcy Act as debts to be extended.

IV.

Pertinent Statutory Provisions.

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of $2\frac{1}{2}$ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of $2\frac{1}{2}$ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6051.

“The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6451.

“On or before the last day of the month following each quarterly period of three months, a return for the preceding quarterly period shall be filed with the board in such form as the board may prescribe.

“For purposes of the sales tax a return shall be filed by every seller. For purposes of the use tax a return shall be filed by every retailer maintaining a place of business in the State and by every person purchasing tangible personal property, the storage, use, or other consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax. Returns shall be signed by the person required to file the return or by his duly authorized agent but need not be verified by oath.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6452.

“The board for good cause may extend for not to exceed one month the time for making any return or paying any amount required to be paid under this part. The extension may be granted at any time provided a request therefor is filed with the board within or prior to the period for which the extension may be granted.

“Any person to whom an extension is granted shall pay, in addition to the tax, interest at the rate of one-half of 1 per cent per month, or fraction thereof, from the date on which the tax would have been due without the extension until the date of payment.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6459.

“If any person fails to make a return, the board shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this State is subject to the use tax. The estimate shall be made for the period or periods in respect to which the person failed to make a return and shall be based upon any information which is in the board’s possession or may come in its possession. Upon the basis of this estimate the board shall compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to 10 per cent thereof. One or more determinations may be made for one or for more than one period.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6511, Art. 3, Chap. 5, Part I, Division 2.

“Any person against whom a determination is made under Articles 2 or 3 of this chapter or any person directly interested may petition for a redetermination within 30 days after service upon the person of notice thereof. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the period.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6561.

“All determinations made by the board under Articles 2 or 3 of this chapter are due and payable at the time they become final. If they are not paid when due and payable, a penalty of 10 per cent of the

amount of the determination, exclusive of interest and penalties, shall be added thereto.”

California Revenue and Taxation Code (Sales and Use Tax Law), Sec. 6565.

“Unless inconsistent with the context and for the purposes of an arrangement *providing for an extension* of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) ‘creditors’ shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or contingent; and

(2) ‘debts’ or ‘claims’ shall include all unsecured debts, demands, or claims *of whatever character* against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or *contingent*.” (Emphasis added.)

Bankruptcy Act, Section 307.

“Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion; *Provided, however*, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that

it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.”

Bankruptcy Act, Section 57d.

“Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.”

Bankruptcy Act, Section 57j.

“A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.”

28 U. S. C. A., Section 959b.

“Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.”

28 U. S. C. A., Section 960.

ARGUMENT.

A.

The Appellee Receiver Was Under a Duty to File California Sales and Use Tax Law Returns and Make Timely Payment of Taxes Due Under That Law in the Same Manner as the Debtor Would Have Been Required to Do if These Proceedings Under Chapter XI of the Bankruptcy Act Had Not Been Commenced.

Reference to 28 U. S. C. A., Section 959b, makes it clear that any receiver appointed in any court of the United States is under a duty to manage and operate the property in his possession as such receiver according to the requirements of the valid laws of the State in which the property is situated in the same manner that the owner thereof would be bound to do if still in possession.

In the instant case, reference to the provisions of the California Sales and Use Tax Law set forth above discloses that Exeter was under a duty to file returns for the period July 1, 1947, to October 16, 1947, and make timely payment of the taxes due for that period under the California Sales and Use Tax Law. If Exeter had not filed returns for that period nor made timely payment of the taxes due, Exeter would clearly have been liable for the penalties here in question. This being the case, appellee Receiver stands in Exeter's shoes and is similarly liable for his delinquency in filing and making timely payment.

Inasmuch as Exeter's property would have been subject to attachment and sale on execution to satisfy the liability

for the penalties here in question if Exeter had retained possession, it is submitted that the property remains subject to that charge in the hands of appellee.

B.

As an Officer of a United States Court Conducting a Business Under Authority of That Court Appellee Receiver Was Required to Comply With State Taxing Provisions and is Subject to the Imposition of Duly Imposed Penalties for Failure to Do So.

It is clear in the instant case that appellee Receiver did operate the business of the debtor under authorization of the District Court. [Tr. 32.] This being so, he was subject to all State taxes applicable to that business to the same extent as if it were conducted by an individual or a corporation. (28 U. S. C. A., Section 960.)

There is no question but that if Exeter had conducted its business after October 17, 1947, the date appellee was duly appointed and qualified [Tr. 15, 32], Exeter would have been required to file returns for the period July 1, 1947, to October 16, 1947, and make timely payment of taxes attributable to that period. If Exeter had not filed those returns and made such payment within the time required by law the penalties here in question would have been imposed.

It is appellant's contention that these penalties are, accordingly, properly imposed upon appellee Receiver and allowable in these proceedings as an expense of his ad-

ministration of Exeter's estate. Appellee Receiver had actual knowledge that the \$350.30 penalty item would be imposed if he failed to act and he is charged with knowledge of the statutory requirement for timely filing of returns.

Thomson v. Toman (C. C. A. 7), 119 F. 2d 971;

Boteler v. Ingels, 308 U. S. 57, 521, 60 S. Ct. 29;

Palmer v. Webster, etc., 312 U. S. 156, 61 S. Ct. 542, 44 Am. B. R. (N. S.) 662;

State of California v. Hisey (C. C. A. 9), 84 F. 2d 802, 805;

Laugharn v. Carter, 19 Cal. 2d 454;

In re Knox-Powell-Stockton Co., 100 F. 2d 979, 983.

C.

In Any Event the Penalties in Question Should Have Been Allowed as Contingent Debts Within the Purview of Section 307 of the Bankruptcy Act.

Section 307 of the Bankruptcy Act (11 U. S. C. A., Sec. 707), clearly provides that the term "debts" or "claims" as used in Chapter XI and applicable exclusively to debts to be extended includes all unsecured debts, demands or claims *of whatever character* against the debtor *whether or not provable* under Section 63 of the Bankruptcy Act, regardless of whether the debts or claims are liquidated or unliquidated, *fixed or contingent*.

It is appellant's position that the penalties here involved were contingent debts of Exeter at the time these proceedings were commenced. That this is so, is clearly evidenced by the nature of the tax involved and the manner in which the penalty is computed. As reference to the California Sales and Use Tax Law discloses, the California sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail, the tax amounting to $2\frac{1}{2}$ per cent (during the period in question) of the gross receipts derived by the retailer from those sales. It is obvious, therefore, that the tax principal for the period July 1, 1947, to October 16, 1947, could have been ascertained simply by taking from Exeter's books the figure disclosing total receipts from sales of tangible personal property at retail and multiplying by $2\frac{1}{2}$ per cent. The penalty imposed for failure to file returns disclosing the tax computed as aforesaid could have been computed upon the commencement of the instant Chapter XI proceedings by merely taking 10 per cent of the aforesaid tax principal. The penalty imposed for failure to pay the aforesaid tax and penalty, as well as the additional interest accruing at the statutory rate of one-half of one per cent per month or fraction thereof on the tax principal only, could likewise have been ascertained at the commencement of these proceedings merely by the application of simple arithmetic. Taking these facts into consideration, it is submitted that appellant's claim for the penalties involved is squarely within the definition of "debts" as contained in Section 307 of the Bankruptcy Act and should have been allowed

pursuant to that section under the extension provision of Exeter's plan of arrangement.

Foust v. Munson S.S. Line (C. C. A. 2), 80 F. 2d 859;

Foust v. Munson S.S. Line, 299 U. S. 77, 32 Am. B. R. (N. S.) 171;

American Service Co. v. Henderson (C. C. A. 4), 120 F. 2d 525;

Hippodrome Bldg. Co. v. Irving Trust Co. (C. C. A. 2), 91 F. 2d 753, 34 Am. B. R. (N. S.) 633, 637.

It is to be noted that the 1938 amendment of the Bankruptcy Act provides in Section 63a(8) that contingent debts are provable and allowable, and in 57d that unliquidated or contingent claims are not allowable only if not capable of liquidation or reasonable estimation in a reasonable time. In the instant case the penalty items, always certain in amount, became a certain liability on March 7, 1948.

It is appellant's contention that the foregoing sections (57d, 63a(8) and 307), especially the definition of "debts" in Section 307 as including debts of whatever character, whether provable or not, compel the conclusion that the instant penalty items should have been allowed as debts to be extended under Exeter's plan of arrangement.

D.

Section 57j of the Bankruptcy Act Does Not Preclude the Allowance of Penalties in Chapter XI Proceedings.

It is immediately apparent from the foregoing that the broad definition of “debts” contained in Section 307 of the Bankruptcy Act is inconsistent with the provisions of Section 57j of the Act, which provides, in short, that penalties owing to a State are not allowable. This inconsistency being present, reference must be made to Section 302 of the Bankruptcy Act to determine which of the foregoing sections shall govern the penalties claimed in this proceeding, inasmuch as Section 302 specifically purports to dispose of problems raised by inconsistencies between provisions governing Chapter XI proceedings and straight bankruptcies.

Since Section 302 provides simply that Chapters I to VII of the Bankruptcy Act (Section 57j being found in Chapter VI), shall apply to Chapter XI proceedings only insofar as those chapters are not inconsistent with or in conflict with the provisions of Chapter XI, it is appellant’s position that Section 57j is not applicable in Chapter XI proceedings involving an extension arrangement in whole or in part and that the only issue present regarding the allowance of the penalties under consideration as debts to be extended is whether they are debts within the meaning of Section 307.

Conclusion.

It is submitted that the Order of the Court below was erroneous; that the objection of appellee Receiver to the allowance of the penalties claimed by appellant should be overruled; and that appellee Receiver should be directed to pay said penalties to appellant Board of Equalization of the State of California as an expense of administration or, in the alternative, as a debt to be extended under the extension provisions of Exeter's plan of arrangement.

Respectfully submitted,

FRED N. HOWSER,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

EDWARD SUMNER,
Deputy Attorney General,
Attorneys for Appellant.

No. 12418

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate
of Exeter Refining Company,

Appellee.

APPELLEE'S REPLY BRIEF.

ERNEST R. UTLEY,

975 Subway Terminal Building, Los Angeles 13,

Counsel for Appellee.

FEB 24 1950

PAUL P. O'BRIEN,

CLERK

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Appellee.

APPELLEE'S REPLY BRIEF.

Statement of the Case.

This appeal is from an order of the Court refusing to allow the California State Board of Equalization two penalties included in its claim for taxes.

The first of these two penalties is for the sum of \$293.48, and is claimed for failure to file sales tax returns after bankruptcy proceedings were commenced, but covering a period which preceded bankruptcy. [See App. Op. Br. p. 5, last paragraph, and Certificate on Review, Tr. p. 33.]

The second of the disallowed penalties is claimed by appellant for failure of the receiver to pay the taxes on or before March 7, 1948, the taxes in question becoming due before bankruptcy, but the date of March 7th being

after bankruptcy, and before it was determined what kind of a plan of arrangement or composition would be approved, if at all, or whether an adjudication would be entered. [See App. Op. Br. p. 6 and Certificate on Review, Tr. p. 34.]

Although the appellant filed its claim herein in the usual form, claiming these penalties together with taxes, as a claim against the estate as distinguished from an expense of administration, it has since conceded that the penalties are allowable, if at all, as expenses of administration. (See App. Op. Br. p. 7.)

ARGUMENT.

The Rights of Creditors Are Fixed as of the Date of the Filing of the Petition in Bankruptcy.

Our courts have repeatedly held that the rights of creditors are fixed as of the date of the filing of the petition in bankruptcy. A few of such decisions are:

United States v. Marxen, 307 U. S. 200;

In re Groenleer-Vance Furniture Co., 23 Fed. Supp. 713 at 715;

In re Miller, 105 F. 2d 926;

Colorado Nat'l Bank v. Newton, 80 F. 2d 696;

In re Gotham Can Co., 45 F. 2d 849, 48 F. 2d 540.

Penalties Not Allowable in Bankruptcy.

Section 57-j of the Bankruptcy Act provides:

“Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with

reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.”

The above provision of the Bankruptcy Act is written into the provisions of Chapter XI of the Bankruptcy Act by reference. Section 302 of Chapter XI of the Bankruptcy Act provides:

“The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to ‘bankrupts’ shall be deemed to relate also to ‘debtors,’ and ‘bankruptcy proceedings’ or ‘proceedings in bankruptcy’ shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered.”

But appellant contends that notwithstanding the above quoted provisions of the Bankruptcy Act, Section 307 of Chapter XI of the Act is broad enough to permit and authorize the allowance of the tax penalties herein claimed.

Section 307 provides:

“Unless inconsistent with the context and for the purpose of an arrangement providing for an extension of time for payment of debts in full *and applicable exclusively to the debts to be extended—*

“(a) ‘creditors’ shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or contingent; and

“(2) ‘debts’ or ‘claims’ shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 63 of this Act and whether liquidated or unliquidated, fixed or contingent.” (Emphasis ours.)

There are several sound answers to appellant’s contention, but the emphasized portion of the quotation above prevents tax claims and tax penalties from falling within the purview of this section. Tax claims, as we shall presently see, cannot be extended in Chapter XI proceedings unless the taxing agency consents thereto—and they never consent. In this connection, it is interesting to note that appellant is not consenting to its tax claim being extended, but on the contrary, is insisting upon payment in full, including penalties, and because the receiver did not pay in full before March 7, 1948, which was at a time before approval of the plan, and before the receiver could have legally paid any claim in the bankruptcy proceedings, this appellant is seeking to penalize the estate further by demanding another penalty in the sum of \$350.30.

Therefore, appellant’s debt hardly falls in the class of “debts to be extended.”

Collier on Bankruptcy, 14th Edition, Vol. 8, page 68, in commenting upon Section 307 of Chapter XI, says:

“Section 307 defines ‘creditors’ and ‘debts’ or ‘claims.’ ‘Creditor’ is also defined in §1(11), while ‘debt’ is also defined in §1(14). The definitions in

§307 apply only 'for the purposes of an arrangement providing for an extension of time for payment of debts in full' and are 'applicable exclusively to the debts to be extended.' An arrangement may be by way of settlement, satisfaction or extension. Where an arrangement is by way of settlement or satisfaction, the definitions in §1(11), (14) apply. Where the arrangement is by way of an extension of time for payment of debts in full, the definitions in §307 apply, *but only to the debts to be extended*. An arrangement may provide for a division of creditors into classes and for dealing with the classes in different ways or upon different terms, or for dealing with one or more of the classes but not with all of them. An arrangement may therefore provide for an extension of time for payment in full of debts in one class, and provide for a settlement or satisfaction of debts in another class. As to debts in the former class, the definitions in §307 apply; as to debts in the latter class, the definitions in §1(11), (14) apply. But even in cases of an extension, the definitions in §307 do not apply for all purposes, but only for the purposes of the arrangement. In extension cases, those definitions would therefore be applicable to determine what debts may be dealt with in the arrangement, and to determine in general the meaning of 'creditors,' 'debts' and 'claims' whenever those words are used in connection with the arrangement itself as distinguished from other matters in the proceeding. In connection with those other matters, the definitions in §307 would not apply. Thus, the nomination of a trustee by creditors under §338 is not for the purposes of the arrangement, but on the contrary is for the purposes of the administration of the estate in bankruptcy in the event an order is entered in the Chapter XI proceeding directing bankruptcy. Hence, in determining the meaning of cred-

itors as used in §338, the definition in §1(11) rather than the definition in §307(1) would apply, even though the arrangement is by way of extension. Moreover, if the Chapter XI proceeding does not culminate in confirmation of an arrangement, but an order is entered directing that bankruptcy be proceeded with, §307 has no effect in the subsequent bankruptcy administration of the case, but only such claims as are provable under §63 can be allowed.” (Emphasis ours.)

It is, and has been, our contention, from the beginning, that Section 307 above referred to has no application whatsoever to claims or debts based upon taxes or tax penalties, and in no way modifies Section 57-j and we believe that the Referee erred in allowing the penalty of \$47.54 referred to on page 5 of appellant’s opening brief, but the amount thereof was too small to warrant the expense of a review.

Further, in support of the trustee’s contention that Section 307 above referred to does not apply to tax claims or penalties is subdivision 1 of Section 306 of Chapter XI, which provides:

“ ‘Arrangement’ shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of *his unsecured debts*, upon any terms;” (Emphasis ours.)

So it is observed that an arrangement such as referred to in Section 307 is defined in the preceding Section 306 as having reference only to unsecured debts or, in other words, general unsecured creditors.

And again, subdivision 2 of Section 337 of Chapter XI provides:

“fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, *the money necessary to pay all debts which have priority*, unless such priority creditors shall have waived their claims or such deposit, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings and the actual and necessary expenses incurred in connection with the proceedings and the arrangement by the committee of creditors and the attorneys or agents of such committee, in such amount as the court may allow; and” (Emphasis ours.)

Therefore, we see that priority (tax) claimants are paid in full upon the approval of the plan unless they expressly waived their claim and do not fall within the classification of creditors whose debts are extended.

See also Section 352 of Chapter XI, which defines the rights, duties and liabilities of creditors.

And also Sections 356 and 361 of Chapter XI and also subdivision 2 of Section 367 and 371 of Chapter XI, all of which distinguishes between prior and unsecured debts and claims.

Plan of Arrangement.

Although the modified plan of arrangement, which was confirmed by the Court, is not included in the transcript, the nature of same is set forth by the Referee in his certificate on review. [See Tr. p. 32.]

In this case, the basic plan is a composition as distinguished from a plan of arrangement providing for an extension of time for the payment of debts in full. The plan here proposes a composition in that the debtor will pay its general unsecured creditors fifty per cent of its unsecured debts in full settlement thereof. However, the plan further provides that if any such creditor so elects, in writing, prior to the confirmation of the plan, the debtor will pay the debt owing to such creditor in full in certain installments. Therefore, essentially, we have two plans (or alternatives) in one, an extension and a composition.

Therefore, if appellant had been a creditor coming within the provisions of Section 307, and affected by the plan, still it did not elect, *in writing*, to an extension of the payment of its debts, and its claim would fall under the composition part of the plan whereby it would receive only fifty per cent of its entire claim, and still would not come within the purview of Section 307 for said section refers only to debts to be extended, and not to compositions.

The position which appellant attempts to take is too absurd to warrant further argument. It is a creditor with the right of priority under Section 64 of the Bankruptcy Act, and under subdivision 2 of Section 337 is entitled to be paid upon the approval of the plan but not before.

It is here contending for its right of priority, not only as to the tax, but as to penalties and interest as well.

When it is confronted with the provisions of Sections 57-j and 302 of the Bankruptcy Act, and the case of *New York v. Saper*, 336 U. S. 328, it seeks refuge under the provisions of Section 307, while still insisting upon priority of payment in full, and refuses to consent to its debt being extended. Section 307 may be a refuge for some claimants, but it is quite apparent that Congress never intended it as an aid to a tax agency to collect a penalty which Congress had elsewhere in the Act prohibited.

Receiver Was Under No Duty to File a Tax Return Covering a Period Before Bankruptcy.

While it is true that a receiver in bankruptcy must file tax returns covering his own period of operation, there is no duty imposed upon such receiver by the Bankruptcy Act or otherwise requiring such receiver to file tax returns covering a period of time before the filing of the bankruptcy petition. If counsel for appellant has any law in support of his point, we respectfully invite him to cite it.

28 U. S. C. A., Sections 959b and 960, cited by appellant, has relation only to the operation by the receiver, and he is not required to answer for the default of the operator who preceded him before bankruptcy.

The cases cited by appellant (Op. Br. p. 14) are not in point. The factual situation in those cases is entirely different. These cases, with the exception of the *Hisey* and *Boteler v. Ingels* cases, are cases where the penalty became due and liens attached before bankruptcy and are, therefore, not in point here. The *Hisey* case, as we read it, is not a bankruptcy case and, therefore, Section 57-j of the Bankruptcy Act does not apply.

The writer of this brief is thoroughly familiar with the case of *Boteler v. Ingels*, 308 U. S. 57, 60 S. Ct. 29, inasmuch as he was the Referee in Bankruptcy who relied upon the language used by the Seventh Circuit Court in the case of *In re Messenger's Merchants Lunch Room*, 85 F. 2d 1002 at 1005, and was reversed. The facts in *Boteler v. Ingels* are entirely different from the case now before the Court. In the *Boteler v. Ingels* case, the penalties were protected by a statutory lien on the vehicles from the date due, and while the license fee became due and payable before bankruptcy, yet the delinquency date arrived after bankruptcy and while the vehicles were being used for purposes of liquidation of the business of the bankrupt's estate by the trustee in bankruptcy after adjudication.

Neither are the cases cited by appellant on page 16 of its opening brief in point or helpful in arriving at the correct answer here. We have already pointed out that appellant's claim, whether contingent or otherwise, was not a debt "to be extended" nor did its claim fall in the class to be extended; therefore, Section 307 of Chapter XI does not apply. These last mentioned cases are cited in support of the contention of appellant that the penalties in question are allowable as a part of the claim herein as contingent debts of the debtor. These cases, it seems, cover the subject matter of the broad construction to be given certain provisions under the old reorganization section of 77-b. It should be noted that a reorganization is a proceeding now covered by Chapter X of the Bankruptcy Act, as distinguished from the proceeding here, which is a Chapter XI proceeding, and the proceeding in this case is basically a composition.

It is a composition in that it offers to pay general unsecured creditors immediately fifty cents on the dollar in full satisfaction of their claims, and a plan of arrangement or an extension of payment insofar as it permits general unsecured creditors, who so indicate, *in writing*, to be paid the full amount of their claims upon a time payment plan.

Frequently attorneys, and a few courts, who are not too familiar with the provisions of the Bankruptcy Act, confuse reorganization proceedings under Chapter X with a plan of arrangement or composition under Chapter XI. The provisions of these two chapters, while they both have a bankruptcy complexion, vary widely in their provisions and the method of operation, and it is never safe to follow a decision involving a question in a reorganization proceeding in support of a similar question involved in a Chapter XI proceeding without first carefully analyzing the provisions of each of the chapters.

Tax Penalties Not Properly Allowable Under Section 307, Chapter XI.

Even if it were possible for a tax penalty to be approved as a claim under the provisions of Section 307 of Chapter XI, still the appellant here has not qualified. The appellant here did not indicate, in writing, its desire to accept the extension of time for payment of its penalties. Therefore, if the penalties were allowed, under any stretch of the imagination, they would fall in the classification of creditors coming under the composition as distinguished from the time payment plan. Of course, if either the plan of arrangement or composition was approved, it is obvious, under the provisions of the Act, taxes would have to be

paid in full, but this could never include a claim for penalties unless they were liens against the property.

Appellant here, in one breath, says that its claim falls in a class of creditors whose debts are to be extended (Section 307, Chapter XI) and in the next breath says that this estate or the receiver or somebody should pay it a penalty of \$350.30 because the receiver did not pay its full claim, including interest and penalties by March 7, 1948. If that isn't an effort to twist the law, it will answer the purpose until a real twister comes along.

To Accept Appellant's Interpretation of Section 307 of Chapter XI Would Be Inconsistent With the Context of All the Provisions of Chapter XI and of the Bankruptcy Act as Well.

Forgetting for the moment that Section 307 is "applicable exclusively to the debts to be extended" the first part of the section begins by saying: "unless inconsistent with the context and for the purposes of an arrangement. . . ."

We submit that to include a tax penalty within the meaning of the words "debts" or "claims" would be inconsistent with the provisions of Sections 302-306, subdivision 1; Section 337, subdivision 2; Sections 352, 356, 361, 367, subdivision 2, and 371, all of which distinguish between prior and general unsecured debts and claims, and the manner and priority of payment thereof.

The words "unless inconsistent with the context" have a substantial bearing upon the question here involved. Congress definitely had in mind to make the provisions of Section 57-j a part of Chapter XI by the provisions of Section 302 of Chapter XI unless provided otherwise in said chapter. Had Congress intended that a tax penalty

should have been included under the provisions of Section 307, it would have been a simple matter for it to have so stated, and that it would have done so is indicated by its reference to Section 63 of the Bankruptcy Act in said section.

See

Collier on Bankruptcy, 14th Ed., Vol. 8, p. 67,
par. 2.21.

Duty of Receivers.

As we have said before, there is no duty imposed upon a receiver in a bankruptcy proceeding either under Chapter XI or otherwise, to file tax returns covering tax periods prior to the filing of the bankruptcy petition. Receivers are custodians. (Bankruptcy Act, Sec. 2, Subd. 3.) Receivers may operate the property of a bankrupt or debtor if authorized so to do by the Bankruptcy Court. Ordinarily they do not pay dividends to creditors. This is the duty of a trustee in bankruptcy. (Bankruptcy Act, Sec. 47, Subd. 11.) The only time of which we are aware that a receiver would be called upon to pay dividends and/or claims of a debtor would be after the confirmation of a plan of arrangement or composition where there was no trustee and the receiver remained in possession. When a Chapter XI proceeding is filed and a receiver is appointed to take charge of the assets, he is without authority to pay any claims due at the time of the filing of the proceeding until a plan of arrangement is confirmed or an order of adjudication entered for failure of confirmation of the plan. If an order of adjudication is entered, a trustee is ultimately appointed and it then becomes the duty of the trustee to pay dividends to creditors. We mention this for

the reason that the appellant is attempting to assert a penalty for the failure of the receiver to pay tax which was due prior to the filing of the petition under Chapter XI, and to pay the same on a date prior to the confirmation of the plan of arrangement herein. If a receiver attempted to follow such a practice, he would go beyond the authority vested in him under the provisions of the Bankruptcy Act, and would get himself into deep water.

The writer of this brief recalls a case of an oil refinery which was in bankruptcy and which, for a time, was operated by a receiver. The exact name of the case has escaped me but I believe it was the case of *Edington Oil & Refining Co.* In this case, the entire assets of the bankrupt were ultimately sold for an amount insufficient to satisfy tax claims of the State and Federal Government in full, and there was extended litigation between the State and Federal Government over the question of liens and rights of priority. Suppose that the receiver in this case had attempted to pay some of the tax claims to have avoided claims for penalties. It is not difficult to see where he would have ultimately found himself. We mention this to emphasize the folly of the contention of the State that the receiver should have paid the tax claims to have avoided the penalties in question. There was no definite way of the receiver or referee knowing what the total amount of the tax claims filed in this proceeding would ultimately be or what the situation would be with respect to the amount of other claims having priority under the provisions of Section 64-a of the Bankruptcy Act.

Act of June 18, 1934.

The Act of June 18, 1934, cited as authority for the proposition that where a receiver operates a business he is liable for the same State taxes as though said business was being operated by the individual, obviously refers to the incurring of taxes by the receiver subsequent to his appointment and beginning with his operations, and not to the payment of taxes which were incurred by the debtor prior to the filing of the petition. In speaking of the legislative history of this Act and its purpose, the Supreme Court in the case of *Palmer v. Webster & Atlas Nat. Bank of Boston*, 312 U. S. 156, 61 S. Ct. 542 at page 545, said:

“The legislative history of the Act discloses its purpose. The committee reports accompanying the bill which became the Act of 1934 state: ‘The purpose of this bill is to subject businesses conducted under receivership in Federal Court to State and local taxation the same as if such businesses were being conducted by private individuals or corporations.’ The reports advert to the fact that federal courts had held a federal receiver operating a business exempt from state sales taxes. They conclude: ‘No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue.’

“What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise.”

We do not question the fact that this Act makes it encumbent upon a receiver or trustee, who operates the property of a bankrupt or debtor to pay State taxes incurred under and by virtue of his operation, but this clearly is distinguished from the payment of taxes which were incurred by the debtor or bankrupt prior to the filing of the bankruptcy proceeding.

We, therefore, respectfully submit that the disallowance of the penalties in question as a claim in this proceeding was justified under the facts and law of the case, and that the decision of the District Court should be affirmed.

Respectfully submitted,

ERNEST R. UTLEY,

Counsel for Appellee.

No. 12418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, ETC.,

Appellee.

APPELLANT'S REPLY BRIEF.

FILED

MAR 6 - 1950

PAUL P. O'BRIEN,

CLERK

FRED N. HOWSER,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

EDWARD SUMNER,

Deputy Attorney General,

600 State Building, Los Angeles 12, California,

Attorneys for Appellant.

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No. 12418

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, ETC.,

Appellee.

APPELLANT'S REPLY BRIEF.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the appellant, California State Board of Equalization, and submits the following reply brief:

I.

Appellee's Reply Brief Misstates Appellant's Position.

Appellee's brief sets forth at page 2 that appellant has "conceded that the penalties are allowable, if at all, as expenses of administration" and cites as authority for that statement Appellant's Opening Brief, page 7. Reference to Appellant's Opening Brief at the page indicated, however, demonstrates that appellant has not made the concession indicated and that the second specification of error, although it is an alternate one, specifically alleges that the penalty items should have been allowed as contingent claims pursuant to Section 307 of Chapter XI of

the Bankruptcy Act. Inasmuch as Section 307 refers to debts, demands or claims of whatever character "against the debtor," it is obvious that the statement at page 2 of Appellee's Reply Brief is erroneous.

Furthermore, appellee erroneously states at page 4 of his brief "that appellant is not consenting to its tax claim being extended, but on the contrary, is insisting upon payment in full including penalties. . . ." This statement is, of course, contrary to the second specification of error set forth in Appellant's Opening Brief at page 7, it being expressly stated at that point that appellant claims the penalty items "as debts to be extended."

At page 8 of Appellee's Reply Brief it is asserted that appellant is "contending for its right of priority, not only as to the tax, but as to penalties and interest as well." This, of course, is not so. To the contrary, the penalties are claimed by appellant "as an expense of administration or, in the alternative, as a debt to be extended under the extension provision of Exeter's plan of arrangement." (App. Op. Br. p. 18.)

II.

Appellee's Contention That Rights of Creditors Are Fixed as of the Date of the Filing of the Petition in Bankruptcy Is Pertinent Only to Appellant's Second, Alternative Specification of Error.

Appellant's second specification of error is, of course, predicated on the theory that appellant's rights, as the holder of a contingent claim, were fixed when Exeter filed its petition under Chapter XI of the Bankruptcy Act. (Appellee's Rep. Br. p. 2.)

III.

Appellant Does Not Contend That Penalties Owing by a Bankrupt Are Allowable in Straight Bankruptcy Proceedings but Does Contend That Penalties Owing by a Debtor Are Allowable in Chapter XI Proceedings Involving an Arrangement Providing for an Extension in Whole or in Part.

Appellant's Opening Brief, we believe, makes it unnecessary to restate appellant's position regarding the inapplicability of Section 57j to Chapter XI proceedings involving an arrangement providing for an extension. (App. Op. Br. p. 17.) However, inasmuch as Appellee's Reply Brief seems to imply, at page 3 thereof, that Section 302 of Chapter XI of the Bankruptcy Act (relied upon by appellant to support its contention that Section 57j is not applicable) is authority for *appellee's* contention that penalties are *not* allowable pursuant to Section 307 as claimed by appellant, the court's attention is directed to the fact that Section 302 specifically provides that the provisions of Chapters I to VII of the Bankruptcy Act (including Sec. 57j) do not apply to Chapter XI proceedings where those provisions are inconsistent with the provisions of Chapter XI.

No reply is made to the portion of Appellee's Reply Brief commencing at page 4 and continuing through page 7, inasmuch as that portion of Appellee's Brief is predicated upon the erroneous premise that appellant is claiming the penalties as prior tax claims and not as unsecured debts to be extended.

IV.

Reply to the Portion of Appellee's Brief Entitled
"Plan of Arrangement."

Appellee contends that appellant's failure "to elect, *in writing*, to an extension of the payment" of the penalties in question makes the claim for those penalties "fall under the composition part of the plan" and that we are, accordingly, not concerned with debts to be extended, within the purview of Section 307. This contention, however, ignores the fact that if the penalties were not claimed as debts to be extended, Section 57j would preclude their allowance to any extent as debts of the debtor under the composition part of the plan. If the penalties are allowable at all in this proceeding under Chapter XI as debts of the debtor it must be on the theory that the penalties are unsecured debts and in fact claimed as debts to be extended. As we have set forth above, although the appellee appears to be confused in this regard, the penalties are claimed by appellant (in the alternative) as unsecured debts to be extended.

Appellee attempts to make capital of the fact that appellant did not specifically elect in writing, prior to the confirmation of the instant plan of arrangement, to come in under the extension provisions of the plan. It is obvious, however, that such a specific election would have been merely an idle act for, as set forth in the preceding paragraph, appellant in fact had no election. Appellant either came in as an unsecured debtor on a debt to be extended or it did not come in at all; and having filed a proof of claim, appellant must necessarily be deemed to have consented to extended payment. It is elementary that the law does not require idle acts.

Appellee attempts to confuse the issue by asserting that appellant is a creditor with a right to priority as a tax claimant under Section 64, and entitled to be paid as such under subdivision 2 of Section 337 upon the approval of the plan but not before. We are unable to perceive how appellant can be entitled to priority under Section 64 and at the same time present a contingent claim under Section 307, which applies exclusively to debts to be extended.

As we have stated above, appellant (on one alternative ground) is not contending for priority of payment pursuant to Section 64 but for payment pursuant to Section 307. The case of *New York v. Saper*, 336 U. S. 328, 69 Sup. Ct. 554, cited by appellee, relates to post-bankruptcy interest in a straight bankruptcy proceeding and is not relevant here. (See Appellee's Rep. Br. pp. 8, 9, 11-13.)

V.

The Penalties Should Be Allowed as an Expense of Administration.

Appellee contends at length (Appellee's Rep. Br. pp. 9-11, 13-16) that a receiver is not liable for statutory penalties accruing for failure to file returns and pay taxes admittedly due, for taxable periods preceding the receiver's appointment. Attention, however, is respectfully directed to the fact that the United States Court of Appeals for the Seventh Circuit has held a Section 77 railroad-debtor trustee liable for penalties under analogous circumstances.

See,

In re Chicago & N. W. Ry. Co.;

Thomson v. Toman, 119 F. 2d 971.

The facts involved in the last cited case can be succinctly summarized. Prior to the commencement of proceedings under former Section 77 of the Bankruptcy Act, 11 U. S. C. A., Section 205, certain real property taxes had become a lien upon the railroad-debtor's property. Payment of the taxes, however, was not required until a date subsequent to the commencement of the proceedings under Section 77, and, accordingly, the penalties for failure to make timely payment did not accrue and become payable until subsequent to the commencement of the Section 77 proceedings and the appointment of the trustee. The court cited *Boteler v. Ingels*, 308 U. S. 57, 60 Sup. Ct. 29, 31, 84 Law Ed. 78 (App. Op. Br. p. 14), quoted the portion of the decision in that case which discusses Section 57j and the Act of June 18, 1934, and concluded that the trustee was liable for the penalties because "the trustee could have prevented the accrual of such penalty."

As was true in the Seventh Circuit case, and as is true here in the case of appellee-receiver,

"It was the nonpayment of the tax *by the trustee* which caused the penalty accrual. If this were a case of first impression, we might hesitate to construe the 1934 Act of Congress so broadly as to make a trustee liable for penalties in the instant case, but the statute, as construed in the *Boteler* case, leaves us without doubt."

In re Chicago & N. W. Ry. Co., *supra*, 119 F. 2d 971, 972.

Conclusion.

It is respectfully submitted that the foregoing decision of the United States Court of Appeals for the Seventh Circuit should be followed herein and the penalties in question allowed as expenses of administration. In the alternative, it is submitted that the penalties in question should be allowed as contingent claims pursuant to Section 307 of Chapter XI as debts to be extended.

Respectfully submitted,

FRED N. HOWSER,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

EDWARD SUMNER,

Deputy Attorney General,

Attorneys for Appellant.

No. 12418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate
of Exeter Refining Company,

Appellee.

PETITION FOR REHEARING.

FRED N. HOWSER,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

EDWARD SUMNER,
Deputy Attorney General,

600 State Building, Los Angeles 12, California,
*Attorneys for California State Board of
Equalization.*

FILED

JUL 27 1950

P. O'BRIEN,
CLERK

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No. 12418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy of the Estate
of Exeter Refining Company,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

The undersigned, your petitioner, respectfully submits that it has been aggrieved by an opinion of Your Honors rendered herein on the 28th day of June, 1950, in the respects hereinafter set forth, and prays for a rehearing of said matter:

1. The Court's holding that a receiver appointed in proceedings under Chapter XI of the Bankruptcy Act is not under a duty to file tax returns for the debtor's operations prior to the commencement of Chapter XI proceedings and to make payment of the tax liability disclosed by said returns is contrary to the decision of the Court of Appeals for the

Seventh Circuit in *Thomson v. Toman*, 119 F. 2d 971, and will greatly hinder and interfere with not only the collection of State taxes but Federal taxes as well.

2. The opinion implies that the filing of tax returns and the payment of taxes attributable to the debtor's operations constitute no part of the management of debtor's business. It is respectfully submitted in this regard that the filing of tax returns due after the appointment of a receiver in Chapter XI proceedings is as much a part of the management of the debtor's business as is the payment of wages, rent, and other similar items. See Sections 959(b) and 960, revised Title 28, U. S. C. A.

3. It is not the Board's position, as is set forth in paragraph 2, page 5 of the opinion dated June 28, 1950, that "since the Receiver conducted the debtor's business, by reason of that fact alone he became liable to penalties on taxes which had accrued prior to the inception of this proceeding." It is the Board's position that a receiver in Chapter XI proceedings is under a duty to file returns for the business he is managing *as the returns become due after the receiver's appointment*. And it is the Board's position further, for the reasons given in the Briefs on file herein, that a receiver should be subject to penalties for *his failure* to file returns as they become due after his appointment, and to make timely payment in the manner required by the pertinent taxing statute.

4. The portion of the opinion holding that Section 57(j) of the Bankruptcy Act, 11 U. S. C. A. Section 93(j), is applicable to all debts claimed in Chapter

XI proceedings, is contrary to the clear language of Sections 302 and 307 of the Bankruptcy Act (11 U. S. C. A., Sections 702 and 707 respectively). In this regard see *State of Missouri v. Earhart*, 111 F. 2d 992, 996, 154 A. L. R. 1255, and Briefs heretofore filed.

5. The impact of the opinion dated June 28, 1950, upon the administration of State and Federal taxing statutes with respect to taxpayers involved in Chapter XI proceedings is of sufficient importance to warrant a rehearing not only of the matters heretofore presented in the Briefs on file herein, but also of the matters above set forth.

Wherefore, petitioner respectfully urges that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

CALIFORNIA STATE BOARD OF
EQUALIZATION,

By FRED N. HOWSER,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

EDWARD SUMNER,
Deputy Attorney General,
Its Attorneys.

Certification.

I, Edward Sumner, Deputy Attorney General of the State of California, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing Petition for Rehearing in the case of California State Board of Equalization, Appellant, v. George T. Goggin, Receiver in Bankruptcy of the Estate of Exeter Refining Company, Appellee, is well founded and is not presented for the purpose of creating a delay.

EDWARD SUMNER.

No. 12422

United States
Court of Appeals
For the Ninth Circuit.

LOMAX TRANSPORTATION COMPANY,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Eastern District of Washington
Northern Division.

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,
CLERK

No. 12422

**United States
Court of Appeals**
For the Ninth Circuit.

LOMAX TRANSPORTATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WITHERSPOON, WITHERSPOON & KELLEY,
Old National Bank Bldg.,
Spokane, Wash.

Attorneys for Appellant.

HARVEY ERICKSON,
United States Attorney,

FRANK R. FREEMAN,
Asst. United States Attorney,
P. O. Bldg.,
Spokane, Wash.

Attorneys for Appellee.

In the District Court of the United States for the
Eastern District of Washington, Northern Division

No. 697

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOMAX TRANSPORTATION COMPANY,
a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney, and complains of the defendant and for cause of action alleges:

I.

That on or about April 22, 1946, Lomax Fireproof Warehouses, Inc. changed its corporate name to Lomax Transportation Company and has its registered office at West 915 Second Avenue in the City of Spokane, Washington, and Lomax Transportation Company is liable for all the debts, obligations and contracts of the Lomax Fireproof Warehouses, Inc.

II.

That on October 2, 1944, Lomax Fireproof Warehouses, Inc., entered into Negotiated Contract No. N66s-231 with the United States of America, whereby Lomax Fireproof Warehouses, Inc., agreed to store certain naval supplies belonging to the plain-

tiff for a period beginning October 2, 1944, and ending June 30, 1945, in its warehouse at 124 South Wall Street in Spokane, Washington.

III.

That on or about December 26, 1944, a fire occurred in the aforesaid warehouse at 124 South Wall Street, Spokane, Washington, which resulted in destruction and loss to the plaintiff's naval property to the extent of \$16,415.87.

IV.

That demand has been made upon the defendant for said sum, but the defendant has refused to pay the same.

V.

That a special provision of said contract provided as follows:

“4-A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.”

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$16,415.87, plus its costs and disbursements herein.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,

[Endorsed]: Filed November 14, 1947.

Assistant U.S. Attorney.

District Court of the United States for the Eastern
District of Washington, Northern Division

Civil Action File No. 697

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOMAX TRANSPORTATION COMPANY,
a corporation,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Harvey Erickson, United States Attorney, Frank R. Freeman, Assistant U.S. Attorney, plaintiff's attorneys, whose address 334 Federal Building, Spokane, Washington an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

A. A. La FRAMBOISE,
Clerk of Court.

[Seal] By /s/EVA M. HARDIN,
Deputy Clerk.

Date: November 14, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on service of writ attached.

[Endorsed]: Filed Nov. 17, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Lomax Transportation Company, a corporation, and moves the Court to dismiss the above-entitled action upon the following grounds:

I.

That the complaint fails to state a claim upon which relief can be granted in that the defendant company would only be responsible for exercise of ordinary diligence and care, but would not be responsible for loss or damage to goods caused by fire, act of God, or other causes beyond its control.

II.

That the complaint fails to state a claim upon which relief can be granted in that it appears on the face of the complaint and particularly by paragraph V that the plaintiff seeks to interpret the contract as a wagering contract in contravention to public policy which precludes the defendant company becoming an insurer without submitting to the regulations of insurance companies.

III.

That the complaint discloses that there is a defect of parties defendant.

IV.

That the complaint discloses that the plaintiff has no legal capacity to sue in that no facts are alleged indicating a failure of defendant to maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.

V.

That the complaint discloses that the plaintiff has no legal capacity to sue in that no facts are alleged that the defendant failed to operate as a warehouseman in accordance with the State of Washington Warehousing Laws.

VI.

That the complaint states a claim which would be violative of defendant's Constitutional rights, particularly under the Fifth Amendment to the Constitution of the United States which guarantees that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation.

/s/ WILLIAM V. KELLEY,

WITHERSPOON,

WITHERSPOON & KELLEY,

Attorneys for Defendant.

Service of the foregoing Motion to Dismiss is hereby acknowledged this 4th day of December, 1947.

/s/ HARVEY ERICKSON,

Attorneys for Plaintiff.

[Endorsed]: Filed December 4, 1947.

[Title of District Court and Cause.]

**ORDER DENYING MOTION TO DISMISS AND
GRANTING IN PART MOTION TO MAKE
MORE DEFINITE AND CERTAIN OR FOR
A BILL OF PARTICULARS**

This matter coming on for hearing before the above-entitled Court on the 8th day of December, 1947, and the plaintiff being represented by Frank R. Freeman, Assistant United States Attorney, and the defendant being represented by William V. Kelley, its attorney, and argument of counsel having been had and the Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the Motion to Dismiss is denied with exception to defendant allowed.

It Is Further Ordered, Adjudged and Decreed that the Motion to Make More Definite and Certain or for a Bill of Particulars is granted as to paragraph II of said motion with leave to plaintiff to set forth copy of said contract by way of a Bill of

Particulars, and denied as to the rest of said motion with exception to defendant allowed.

Dated this 9th day of December, 1947.

/s/ SAM M. DRIVER,
U.S. District Judge.

Presented by:

/s/ W. V. KELLEY,
Attorney for Defendant.

Approved as to form:

/s/ FRANK R. FREEMAN,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 9, 1947.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes now the plaintiff herein and in compliance with the order of the Court, dated December 9th, 1947, sets forth the following contract between the United States of America and Lomax Fire Proof Warehouses, Inc., dated the 2nd day of October, 1944:

Negotiated Contract No. N666s-231
Opening 2 October, 1944

CONTRACT (Supplies)

Req'n No. NT4-64-8052

Bu. Supplies & Accounts Station (666) Naval
Supply Depot

App'n 1750803.10 Maintenance, Bu SandA, 1945
Purchasing Office Naval Supply Depot, Spokane,
Washington

Department. Navy Department

Contractor. Lomax Fire Proof Warehouses, Inc.

Contract for Services, Storage & Handling

Amount, \$ Such sums as may become due

Place Naval Supply Depot, Spokane, Washing-
ton.

This Contract, entered into this second day of
October, 1944, by the United States of America,
hereinafter called the Government, represented by
the contracting office executing this contract, and
Lomax Fire Proof Warehouses Inc. (i) a corpora-
tion organized and existing under the laws of the
State of Washington

(ii) a partnership consisting of

(iii) an individual trading as

whose address is S. Wall Street, Spokane, Wash-
ington hereinafter called the Contractor, witnesseth
that the parties hereto, pursuant to the provisions
of the First War Powers Act, 1941, do mutually
agree as follows:

Article 1.

Scope of this Contract.—The Contractor shall fur-
nish and deliver all of the articles and perform all
of the services, described in the schedule, consisting
of———sheets attached hereto, for the considera-
tion stated therein, free from defects in material or

workmanship and in strict accordance with the specifications and drawings attached to or designated in such schedule, all of which are made a part hereof. "General Specifications for Inspection of Material," issued by the Navy Department July 1, 1941, shall also form a part of this contract. The rights and obligations of the parties hereto shall be subject to the provisions contained in Articles 1 to 18 of this contract, such "General Specifications for Inspection of Material," and the provisions of the attached schedule. In the event of any inconsistency between the provisions of the said articles or such "General Specifications for Inspection of Material," and the provisions of the attached schedule, the provisions of the attached schedule shall be deemed to control to the extent of such inconsistency.

Deliveries shall be made as stated in the attached schedule.

All shipments by the Contractor shall be marked by the Contractor in accordance with provisions of "Navy Shipment Marking Handbook," issued by the Navy Department, Bureau of Supplies and Accounts.

Article 2.

Changes.—The specifications, drawings, or designs applicable to any of the items covered by this contract (and also, in the case of spare parts, the quantities or designations), or any provisions with respect to the method of shipment or packaging or the place of delivery, may be changed at any time by the contracting officer by written notice given to

the Contractor. Any such change may be made without notice to the sureties, if any, and the Contractor shall give effect to such change without delay. If any such change so ordered shall involve an increase or decrease in the amount or character of the work to be done under this contract or in the time required for its performance, an equitable adjustment shall be made in the contract price and in such other provisions of the contract as may be necessary and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive, consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. In the event of the failure of the parties to agree upon the adjustment to be made, the dispute shall be determined in accordance with the Article hereof entitled "Disputes," but nothing contained in this Article shall excuse the Contractor from giving immediate effect to any change.

Article 3.

Extras.—Except as otherwise herein provided, no charge for extras will be allowed unless the same have been ordered in writing by the contracting officer and the price stated in such order.

Article 4.

Increase or decrease.—Unless otherwise specified, any variation in the quantities herein called for, not exceeding 10 percent, will be accepted as a compliance with the contract, when caused by conditions of loading, shipping, packing, or allowances in manufacturing processes, and payments shall be adjusted accordingly.

Article 5.

Inspection.—(a) All material and workmanship shall be subject to inspection and test by the Government during manufacture, when practicable, and at all other times and places. In case any articles are defective in material or workmanship, or otherwise not in conformity with the specification requirements, the Government shall have the right to reject such articles or require their correction or replacement. Rejected articles, or articles requiring correction, shall be removed by and at the expense of the Contractor promptly after notice so to do and shall not be used until corrected, reinspected and passed by the Government. Rejected articles not suitable for correction shall be so segregated by the Contractor as to preclude the possibility of use under this contract. In the event public necessity requires the use of materials or supplies which are defective in material or workmanship or not in accordance with the specifications, payment therefor shall be made at a proper reduction in price.

(b) All inspections and tests by the Government

shall be performed in such a manner as not to delay the work unduly. Special and performance tests shall be as described herein and in the specifications. If any inspection and test is made on the premises of the Contractor or a subcontractor, the Contractor shall provide a complete inspection system acceptable to the Government's inspectors and all reasonable facilities and assistance for the safety and convenience of the inspectors in the performance of their duties. In the event articles are not ready at the time inspection is requested by the Contractor, the Government may charge to the Contractor any additional cost of inspection and test.

(c) Final inspection will be made at the point of delivery, unless otherwise stated. Final inspection and acceptance shall be conclusive except as regards latent defects or fraud.

Article 6.

Responsibility for supplies tendered.—The Contractor shall be responsible for the articles covered by this contract until they are delivered, and the Contractor shall bear all risk on rejected articles after notice of rejection. Where final inspection is at point of origin but delivery by the Contractor is at some other point, the Contractor's responsibility shall continue until delivery is accomplished.

Article 7.

Payments.—The Contractor shall be paid, upon the submission of properly certified invoices or

vouchers, the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. Unless otherwise specified in this contract, payments will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payments for accepted partial deliveries shall be made whenever such payments would equal or exceed either \$1,000 or 50 percent of the total amount of the contract.

Article 8.

Federal excise taxes.—(a) Except as otherwise indicated in this contract, the prices stated herein exclude all Federal excise taxes in effect at the date of this contract and directly applicable to the completed supplies or work covered hereby, and upon the request of the Contractor, the Government will issue appropriate tax-exemption certificates with respect to such excluded Federal excise taxes.

(b) The prices stated herein include all other Federal taxes in effect at the date of this contract and incurred in performance hereof, including (i) all Federal excise taxes upon or with respect to materials entering into the production of such supplies or work, or used or consumed in connection with the production thereof, (ii) all Federal excise taxes upon transportation charges, and (iii) all other Federal taxes in effect at the date of this contract. If, after the date of this contract, the Federal Government shall impose or increase the rate of any

tax, duty, impost, excise or sale, use, transportation, occupational, gross-receipts tax, or any other similar tax or charge, other than a tax upon the income of the Contractor, directly applicable to the supplies of work covered hereby or to the materials used in the production of such supplies or work, or to the importation, transportation, production, processing, manufacture, construction, sale or use of such supplies, work, or materials, which tax or charge must be borne by the Contractor because of a specific contractual obligation or by operation of law, then (1) the prices stated herein will be accordingly increased and any amount due to the Contractor as a result of the increase in such prices will be charged to the Government and entered upon invoices as a separate item, or (2) at its option, the Government in lieu of payment of such increase will issue to the Contractor appropriate tax-exemption certificates or furnish other proof of exemption with respect to such tax or charge.

(c) If the Contractor is relieved from the payment of any Federal tax or charge or portion thereof included in the prices stated herein, by reason of the decrease or elimination of such tax, the Contractor shall promptly submit to the contracting officer a statement showing the amount of such decrease or elimination, and the prices shall be adjusted to reflect such decrease or elimination as agreed to, or in the event of failure to agree, as determined by the contracting officer, and the contract shall be modified accordingly.

Article 9.

Transfer of contract and assignment of claims.—

(a) Neither this contract nor any interest herein nor any claim arising hereunder, except as otherwise provided in this Article, shall be transferred by the Contractor to any party or parties.

(b) If this contract is not classified as “confidential” or “secret,” and if the contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due to the Contractor from the Government arising out of this contract may be assigned to any bank, trust company, or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, shall not be subject to further assignment, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract. In the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (1) the General Accounting Office of the Government, (2) the contracting officer, (3) the surety of sureties upon the bond or bonds, if any, in connection with this contract, and (4) the disbursing officer designated to make payments under this contract.

(c) Payments to an assignee of any claims arising under this contract shall not be subject to re-

duction or set-off for an indebtedness of the Contractor to the United States arising independently of this contract.

(d) Information contained in plans, specifications, or any similar document, relating to the work under this contract and marked "secret," "confidential," or "restricted," shall not, in connection with the assignment of any claim under the contract, be communicated, transmitted, or disclosed to any person not otherwise entitled to receive it, except with the prior consent of the contracting officer or his duly authorized representative in each instance.

Article 10.

Termination for default in delivery of articles or in performance of services.—The Government may, by written notice to the Contractor, terminate this contract as to all or any portion of the articles not already delivered or as to services not already performed whenever the Contractor fails to deliver any of the articles or to perform any of the services, herein provided to be furnished or performed, within the time specified herein or any extension thereof, and in the event of such termination the Government, in addition to any other remedies which it may have, may procure similar articles or obtain similar services elsewhere and the Contractor shall be liable to the Government for any excess cost occasioned the Government thereby; Provided, however, That the contract may not be terminated under this Article and the Contractor shall not be charged

with any liability for failure or delay in delivery or performance when such failure or delay is due to causes beyond the control and without the fault or negligence of Contractor, including but not restricted to (1) acts of God or of the public enemy, (2) acts of the Government of the United States or any State or political subdivision thereof, (3) fires, floods, explosions, earthquakes, or other catastrophes, (4) epidemics, (5) Quarantine restrictions, (6) strikes, (7) freight embargoes, (8) unusually severe weather, (9) inability of the Contractor to obtain equipment or material due to the operation of governmental priorities, preferences or allocations of equipment or material, and (10) delays of a subcontractor or supplier in furnishing material or supplies owing to causes beyond the control and without the fault or negligence of such subcontractor or supplier, including but not restricted to the foregoing enumeration, unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable from other sources and shall have ordered the Contractor to procure such materials or supplies from other sources; And provided, That the Contractor shall notify the contracting officer in writing of the cause of any such excusable failure or delay within twenty (20) days from the beginning thereof or within such longer period as the contracting officer shall, prior to the date of final settlement of the contract, specify for giving of such notice. Promptly on receipt of such notice, the contracting officer shall

ascertain the facts and extent of the failure or delay, and if he shall find that the failure or delay was occasioned by causes beyond the control and without the fault or negligence of the Contractor, he shall accordingly extend the time of delivery or performance or otherwise revise the delivery schedule. The finding of fact of the contracting officer shall be final and conclusive, subject only to appeal within thirty (30) days by the Contractor to the Secretary of the Navy or his duly authorized representative, whose decision on such appeal, as to the facts and extent of the failure or delay, shall be final and conclusive.

For necessary services as may be required for the balance of the fiscal year 1945, beginning 2 October 1944 and ending 30 June 1945 in connection with warehousing Navy Stores.

1. Such services and materials, including, but not by way of limitation, warehousing space, necessary to properly remove from cars, carry to place of rest, store in clean, dry and safe manner, and remove from place of storage F.O.B. cars, as required. Estimated quantity of stores 2,500,000 lbs.

Estimated quantity of storage space is from 40,000 to 75,000 sq. ft. located in warehouses of Lomax Fire Proof Warehouses at 124 S. Wall Street and 1208 Ide Street, Spokane, Washington.

2. Rates, bulk material.

A. \$.125 per hundred weight for first month storage, including removal from car to ware-

house and place of rest, and including moving out of warehouse F.O.B. car.

B. \$.035 per hundred weight per month thereafter for dead storage.

3. Rates, palletized material.

A. \$.11 per hundred weight for first month storage, including removal from car to warehouse and place of rest, and including moving out of warehouse F.O.B. car.

B. \$.03 per hundred weight per month thereafter for dead storage.

4. Special Provisions.

A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the state of Washington Warehousing Laws.

B. Contractor agrees to promptly remove from cars and store, or remove from storage and load in cars, materials at an estimated rate of six carloads per day at each warehouse. The Contractor will not be required to handle more than twelve carloads per day, either unloading or loading, unless by prior agreement with the Supply Officer in Command or Stores Officer, Naval Supply Depot, Spokane, Washington

In the event the contractor fails to locate

shipment for unloading or to load outgoing cars promptly and demurrage accrues, it shall be for the account of the contractor.

C. The contractor shall furnish to the Supply Officer in Command, Naval Supply Depot, Spokane, Washington, Bonded Warehouse Receipts for all materials in storage.

D. The Supply Officer in Command, Naval Supply Depot, Spokane, Washington, shall furnish the contractor with Government Bills of Lading covering outgoing material as authority to make shipment.

E. Any wooden pallets which are not utilized in making shipments shall remain the property of the Navy and be made available for pickup by Naval Supply Depot, Spokane.

Inspection

The Supply Officer in Command, Naval Supply Depot, Spokane, Washington, or designated representatives, may, at any time, during life of contract, inspect storage conditions to see that they conform with terms of contract.

Invoices

Submit properly certified invoices in triplicate to the consignee, monthly, in accordance with attached instructions.

Clauses

The attached sheet entitled "Uncertain and Varying Needs of the Navy" form a part of this contract.

The Navy reserves the right to terminate the contract upon thirty days written notice to the Contractor.

Uncertain and Varying Needs of the Navy

The uncertain and varying needs of the Navy (or Government) make it impossible to determine the quantity or quantities of the articles and material described herein that may be required during the contemplated period of the contract. Estimated quantities are stated for information only. It is mutually understood and agreed that the Government will order and the contractor will deliver the quantities of the kinds of articles and materials described in the specifications that in the judgment of the ordering office may be required during the contract period, except as may be otherwise indicated in the bid. These supplies will be ordered from time to time during the life of the contract in such quantities for delivery in such forms and to such places provided for by the contract as the needs of the Naval Service requires. Bids made with the proviso that the total deliveries will not exceed a certain specified quantity will be considered, but the right is reserved to reject any bid which provides that the Government shall guarantee to take any definite quantity.

Additional Applicable Clause

Contract Proviso

Article e. Overtime compensation of laborers and mechanics.—This contract is subject to the provisions of Section 303 of the Second Supplemental National Defense Appropriation Act, 1941 (Public No. 781, 76th Congress), approved September 9, 1940.

Forward invoice in triplicate (original and two copies) to the Supply Officer in Command, Naval Supply Depot, Spokane, Washington. The original is to have an autographic signature. The signature on the duplicate invoice may be typed or stamped. All copies of invoice are to bear the Navy Order number and be certified as follows:

“I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that state or local sales taxes are not included in the amounts billed.”

.....

Company Name

By.....

Official title as Mgr., etc.

Article 11.

Termination for convenience of the Government.

—The Government may, by written notice to the

Contractor, terminate this contract as to all or any portion of the articles not already delivered or as to services not already performed, whenever the contracting officer shall determine that such termination is for the best interest of the Government. Such termination shall become effective on the date specified in such notice, which date shall not be earlier than 10 days after the date of receipt thereof by the Contractor. In the event of such termination, the Government shall pay to the Contractor within a reasonable time (1) an amount equivalent to the aggregate of the unit prices, as specified in the contract, for services performed and for articles completed and delivered and accepted by the Government and not previously paid for, and (2) an amount representing fair compensation to the Contractor, with due regard to the amounts already paid to it or to be paid under (1) hereof and to its costs, expenditures, liabilities, commitments, work and expenses of settlement, and including such allowance for profit as is reasonable under all the circumstances: Provided, however, That the total sum to be paid to the Contractor in the event of such termination shall not exceed the total contract price for full performance of the contract. In the event of failure of the parties to agree upon the amount to be payable hereunder, such amount shall be determined in accordance with the Article hereof entitled "Disputes."

Article 12.

Patents.—The Contractor shall hold and save the

Government, its officers, agents, servants, and employees, harmless from patent liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention made or used in the performance of this contract, including the use or disposal thereof by or on behalf of the Government: Provided, That the foregoing shall not apply to inventions covered by applications for United States Letters Patent which, on the date of execution of this contract, are being maintained in secrecy under the provisions of Title 35, U.S. Code (1940ed.), Section 42, as amended.

Article 13.

Walsh-Healy Act.—If this contract is for a definite amount in excess of \$10,000 or for an indefinite amount which may exceed \$10,000, there are hereby incorporated herein by reference the representations and stipulations pursuant to Public Act No. 846, 74th Congress, known as the Walsh-Healy Public Contracts Act, as set forth in Article 1 of Par. I of Regulations No. 504, issued by the Secretary of Labor pursuant to such Act, as from time to time amended.

Article 14

Officials not to benefit.—No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15.

Covenant against contingent fees.—The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article 16.

On discrimination in employment.—The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color, or national origin. The Contractor further agrees that each subcontract made under this contract will contain a similar provision with respect to nondiscrimination.

Article 17.

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written

appeal by the Contractor within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with performance.

Article 18.

Definitions.—(a) The Term “Secretary of the Navy,” as used herein, shall mean the Secretary, Under Secretary, or any Assistant Secretary of the Navy, and the term “his duly authorized representative” shall mean any person authorized to act for him other than the contracting officer.

(b) The term “contracting officer,” as used herein, shall include his duly appointed successor or his authorized representative.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF
AMERICA,

/s/ J. BALL

By J. BALL, Captain (SC) USN
Supply Officer in Command
(Official title)

LOMAX FIRE PROOF
WAREHOUSES, INC.
(Contractor)

By /s/ J. M. LOMAX

President

(Official title)

S. 124 Wall Street,

Spokane, Wn.

(Business address)

Two witnesses:

/s/ HELEN FERGUSON

/s/ B. C. REDHEAD

I, W. W. Witherspoon, certify that I am the Secretary of the corporation named as contractor herein; that J. M. Lomax who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[Corporate Seal]

s/ W. W. WITHERSPOON

Dated this 16th day of December, 1947.

/s/ HARVEY ERICKSON,

U.S. Attorney.

/s/ FRANK B. FREEMAN,

Assistant U.S. Attorney.

[Endorsed]: Filed December 16, 1947.

[Title of District Court and Cause.]

ORDER FOR PRE-TRIAL CONFERENCE
UNDER RULE 16

To: Harvey Erickson, United States Attorney, for plaintiff, Federal Building, Spokane 6, Washington; Witherspoon, Witherspoon & Kelley, 1114 Old National Bank Building, Spokane 8, Washington, Attorneys for defendant.

By virtue of Pre-trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above entitled Court on Wednesday, February 25, 1948, at 10:00 o'clock, a.m., in the Judge's Chambers, in the Post Office Building, at Spokane, Washington, to consider:

(1) The simplification of the issues.

(2) The necessity or desirability of amendments to the pleadings.

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

(4) The limitation of expert witnesses.

(5) Such other matters as may be of aid in the disposition of the action.

The Clerk of this Court is directed to forthwith serve this order upon the above named parties by

mailing a copy thereof to their attorneys at the addresses disclosed by the record herein.

Dated this 11th day of February, 1948.

/s/ SAM M. DRIVER,

United States District Judge.

Copy mailed counsel 2/11/48.

[Endorsed]: Filed February 11, 1948.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

Pursuant to an order for pre-trial conference under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 25th day of February, 1948, Harvey Erickson, appearing as Attorney for the Plaintiff, and William V. Kelley appearing as Attorney for the Defendant.

Defendant admits paragraph 1 of plaintiff's complaint and it is stipulated that the defendant is a corporation organized under the laws of the State of Washington.

It is stipulated that either party may offer in evidence the contract a copy of which is attached to the bill of particulars on file herein, without objection to its authenticity.

Defendant's oral motion to amend its answer is granted and said defendant is allowed two (2) weeks in which to file said amended answer.

It is ordered that this pre-trial conference be, and the same is hereby continued to March 29, 1948, at 10 a.m.

Dated this 25th day of February, 1948.

/s/ SAM M. DRIVER,
U. S. Judge.

Copies mailed Feb. 25, 1948.

[Endorsed]: Filed February 25, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, Lomax Transportation Company, a corporation, by its attorneys, and with leave of Court for an amended answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits paragraph I.

II.

Admits paragraph II.

III.

Answering paragraph III, admits that a fire occurred without any negligence on the part of defendant at the time and place alleged and denies each and every other allegation, matter and thing therein alleged and further alleges that within a short time

after the occurrence of said fire, a Navy Board of Inquiry on behalf of plaintiff investigated the causes of said fire and found there was no apparent negligence on the part of the defendant and that recovery from the defendant under the insurance alleged in Article 10, Paragraph 4, Special Provisions, Sub-division A, of the contract set forth in plaintiff's bill of particulars, would be limited to the defendant's legal liability under existing Warehouse Laws of the State of Washington; that defendant's liability under said laws and particularly Remington's Revised Statutes §3607 was and is limited in the absence of an agreement to the contrary to losses or injuries to goods which could not have been avoided by the exercise of such care in regard to them as a reasonably careful owner of similar goods would exercise.

IV.

Admits paragraph IV.

V.

Admits paragraph V.

Further answering plaintiff's complaint and as a first affirmative defense, defendant alleges:

I.

That the said contract was drawn and made by the plaintiff on a printed form contract designated as S and A Form 102 (Revised May 1943); that said form contract is a contract for the procure-

ment of supplies and is not adapted to the leasing of warehouse space and that it contains much irrelevant and immaterial matter in fine print.

II.

That at and before the making and execution of said written contract set forth in plaintiff's bill of particulars, the plaintiff and the defendant intended that said instrument should mean and that the legal consequences thereof should be as follows, to-wit: that the defendant company would only be responsible for the exercise of ordinary diligence and care and would not be responsible for loss or damage to said goods caused by fire, act of God, or other causes beyond its control.

III.

That through the mutual mistake of the plaintiff and defendant, the said written contract did not and does not truly express the aforesaid intentions of the parties thereto and does not truly express or set out what were intended to be the legal consequences of said written contract in this, to-wit: that the phrase, "Contractor assumes absolute responsibility for property in his possession. ." contained in Article 10, Section 4 A of the said written contract purports to impose upon the defendant a liability in excess of that intended by the parties as more particularly set forth in paragraph II of the first affirmative defense; that said phrase was typewritten in said contract under the direction of

the contracting officer of the plaintiff and that said contracting officer was without authority to impose such a liability upon the defendant herein without the approval of the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section); that the said contract was not approved by the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section); that at the time of execution of said contract the Navy Department had adopted a policy of self insurance of government owned goods in the hands of contractors and that contractors in possession of government owned goods were to be liable only for loss due to their own negligence or misdoing.

IV.

That the defendant was not negligent in signing said written contract; that said phrase, "The contractor assumes absolute responsibility for goods in his possession. ." when read in connection with the balance of the sentence, " . . in accordance with the State of Washington Warehousing Laws," is ambiguous and meaningless and does not impose any liability upon the defendant in excess of that imposed by the laws of the State of Washington.

Further answering said complaint and as a second affirmative defense thereto, defendant alleges:

I.

That defendant did maintain Bond and Insurance at its own expense in accordance with the State of Washington Warehousing Laws, and the plaintiff, United States, by its conduct in accepting warehouse receipts in connection with the storage of its goods, and its own interpretation of its own contract construed the contract as one for a warehouseman's legal liability and is therefore estopped and precluded from seeking to interpret the contract as an insurance contract; that said warehouse receipts specifically provided in part concerning the liability of defendant as follows:

“Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following terms and conditions, said goods stored in warehouse located at No. 124 S. Wall Street, Spokane, Washington.

“The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control.”

Wherefore, this defendant prays that plaintiff's complaint be dismissed and for all other equitable relief in the premises, including the reformation of said contract to express the true intention of the

parties, together with its costs and disbursements in this action.

/s/ W. V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

Service of the foregoing Amended Answer is accepted this 11th day of March, 1948.

/s/ HARVEY ERICKSON,
Attorney for Plaintiff.

[Endorsed]: Filed March 11, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF
DEFENDANT'S ANSWER

Comes now the attorneys for the plaintiff and move the Court to strike

1. Paragraph 3 of the defendant's answer except that portion which admits that a fire occurred.

2. The First Affirmative Defense for the reason that the matter set forth in the said First Affirmative Defense cannot be asserted against the Sovereign and that the matters therein alleged are incompetent, irrelevant and immaterial to the issues presented by plaintiff's complaint.

3. The Second Affirmative Defense for the reason that the matters therein contained are incom-

petent, irrelevant and immaterial to any of the issues set forth in the plaintiff's complaint and estoppel and laches are not assertable against the Sovereign.

/s/ HARVEY ERICKSON,
/s/ FRANK R. FREEMAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 12, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The pre-trial conference, called by the Court in the above-entitled cause, pursuant to Rule 16, Rules of Civil Procedure for District Courts, came on regularly for hearing before the Court, in Chambers, on April 1, 1948, at 10:00 o'clock, a.m., plaintiff appearing by its attorney, Harvey Erickson, United States Attorney, and the defendant appearing by its attorney, William V. Kelley, of Witherspoon, Witherspoon & Kelley, and the Court being fully advised in the premises,
It Is Ordered:

1. That with reference to a folder of documents, described as "The Board of Investigation File of the Navy Department", which has been deposited with the Clerk and marked as plaintiff's identification "1", it is agreed that any document therein

may be offered at the instance of either party and admitted in evidence without proof of its execution and authenticity, and without producing or accounting for its original, if the document is a copy, each party, however, reserving the right to except to the admissibility of any such document on the ground of irrelevancy, immateriality or incompetency.

2. It is further agreed by the parties that in the above-entitled case the Court may take judicial notice of any pertinent portion, provision, or article of an official publication of the Navy Department, known as the "Bureau of Supplies & Accounts Manual", a copy of which is now in the office of the United States Attorney, at Spokane.

Dated this 1st day of April, 1948.

/s/ SAM M. DRIVER,

U. S. District Judge.

[Endorsed]: Filed April 1, 1948.

[Title of District Court and Cause.]

REQUESTS FOR ADMISSION
UNDER RULE 36

Comes now Plaintiff by Harvey Erickson, United States Attorney, and Frank R. Freeman, Assistant United States Attorney, pursuant to the provisions of Rule 36 of the Rules of Civil Procedure, and requests the admission by the defendant of the gen-

uineness of the following document described herewith:

“Under the terms of the aforesaid contract, the debtor agreed to furnish such services and materials as may be required and to store for the balance of the fiscal year beginning October 2, 1944, and ending June 30, 1945, a quantity of Navy stores in warehouses located at Lomax Fire Proof Warehouses at 124 South Wall Street, and 1208 Ide Street, Spokane, Washington. The debtor further agreed to assume absolute responsibility for the property in its possession and to maintain bond and insurance at its own expense in accordance with State of Washington Warehousing Laws.

“On the afternoon of December 26, 1944, a fire occurred in the Lomax Fire Proof Warehouse, 124 South Wall Street, Spokane, Washington, which resulted in loss and damage to Navy property, and since the debtor has failed to reimburse the Government for such loss and damage, it is indebted to the United States in the sum of \$16,415.87, a shown by the following statement:

Material	Repacked	Salvaged	Destroyed	Unit Value	Appr. Unit Value	Total Damage to Navy
Pillows	320	70		.60	4.50	\$ 37.50
Twill	8266	27738 yds		.50	4,154.80	9,714.20
Towels		2350 pkgs	26075	.0868	203.98	2,263.31
Jumpers	4837			9.00		
Cups, coffee..	480					
Chinaware ..	3172	46	386	.20	9.20	77.20
Glassware	6192	158	17698	.17	13.43	3,022.09
Containers ..	1128	869	253	.52	8.69	574.75
Direct labor—Salvage operations—Job No. 315-26.....						568.96
Direct Materials—Salvage operations—Job No. 315-26.....						270.27
Total damages.....						\$16,528.28
Less amount previously allowed on claim No. 2032679(1)						112.41
Total amount due the United States.....						\$16,415.87

It is requested that the defendant admit the genuineness of each of the itemized amounts set forth in the above schedule and the total damage to the Navy as outlined in column 7 of the schedule above outlined.

/s/ HARVEY ERICKSON,
/s/ FRANK R. FREEMAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 9, 1948.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, attorneys for plaintiff herein, and in reply to defendant's first affirmative defense alleges as follows:

I.

The allegations of Paragraph I are admitted insofar as they allege that the contract was drawn and made by the plaintiff and defendant on a printed form for the procurement of supplies, but that by including typewritten provisions was made applicable to the lease of warehouse space.

II.

That the allegations of Paragraph II are denied.

III.

That the allegations of Paragraph III are denied.

IV.

That the allegations of Paragraph IV are admitted insofar as they allege that the defendant was not negligent in signing the written contract. The

remainder of the allegations of paragraph 4 are denied.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Cause.]

INTERROGATORIES

Comes now the plaintiff, under the provisions of Rule 33 of the Rules of Civil Procedure, and in pursuance of the provisions of that rule propounds the following interrogatories to the defendant for answer:

1. State whether or not any attempt was made by the plaintiff, after execution of negotiated contract N666S231 on October 2, 1942, and the date of the institution of this action on November 14, 1947, to secure a reformation, revision, or modification of the above contract.

2. If the answer to No. 1 is "yes", give in detail the steps taken by the defendant corporation to secure administrative relief pursuant to naval regulations. Set forth any correspondence had with the

Naval Department seeking to secure said reformation, revision, or modification of said contract.

3. If the answer to No. 1 is in the affirmative, state the name of the officer of defendant corporation having any verbal or oral conferences seeking a revision, modification or reformation of the above contract.

4. If the answer to No. 1 is in the affirmative, give the names of any officers or personnel of the United States Navy who had any oral conversation with the agents of the defendant corporation seeking a revision, modification or reformation of the above contract with the dates as nearly as possible when such oral conversations took place.

5. Relate any other steps that have been taken by the defendant to secure administrative relief in the above contract by the defendant after the execution of said contract before the occurrence of the fire and after the occurrence of the fire and between the time of the institution of this action in the United States District Court.

6. State the name of the officers or individuals referred to in paragraph No. 2 of the defendant's first affirmative defense who stated to the defendant that the defendant company would only be responsible for the exercise of ordinary diligence and care, and would not be responsible for loss or damage to

said goods caused by fire, an act of God, or other causes beyond its control.

Dated this 31st day of March, 1949.

/s/ HARVEY ERICKSON,
U. S. Attorney.

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO ANSWER PLAINTIFF'S INTERROGATORIES

The parties stipulate, through their undersigned attorneys, that the time within which the answers to plaintiff's interrogatories, served March 31, 1949, may be served upon plaintiff may be extended to May 1st, 1949, subject to the approval of the Court.

Dated this 7th day of April, 1949.

/s/ HARVEY ERICKSON,
Attorney for Plaintiff.

/s/ WILLIAM V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO ANSWER
PLAINTIFF'S INTERROGATORIES

This matter coming on for hearing before the Court on stipulation of counsel, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged And Decreed that the defendant may have to and including May 1st, 1949, in which to answer interrogatories of plaintiff herein served March 31, 1949.

Dated this 7th day of April, 1949.

/s/ SAM M. DRIVER,
U. S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U. S. Attorney.

Approved as to form:

/s/ W. V. KELLEY.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

ORDER ON MOTION TO STRIKE

This matter coming on for hearing before the Court, and the Court having heard the argument of counsel and having considered the briefs of both plaintiff and defendant, and being fully advised in the premises, it is by the Court

Ordered, Adjudged And Decreed that paragraph 1 of plaintiff's motion to strike paragraph III of defendant's amended answer will be granted, except that portion of paragraph III which reads as follows:

"Answering paragraph III, admits that a fire occurred without any negligence on the part of the defendant at the time and place alleged and denies each and every other allegation, matter and thing therein alleged."

It Is Further Ordered that the plaintiff's motion to strike the first affirmative defense will be denied and that plaintiff's motion to strike defendant's second affirmative defense will be granted and said second affirmative defense will be stricken in its entirety.

Dated this 7th day of April, 1949.

/s/ SAM M. DRIVER,
U. S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U. S. Attorney.

Approved:

/s/ W. V. KELLEY,
Attorney for Defendant.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

REPLY TO INTERROGATORIES

Comes now the defendant and in response to the interrogatories served upon the defendant by the plaintiff on the 31st day of March, 1949, answers as follows:

1. In answer to the first interrogatory: None except as shown by the pleadings.
2. In answer to the second interrogatory: None.
3. In answer to the third interrogatory: None.
4. In answer to the fourth interrogatory: None.
5. In answer to the fifth interrogatory: None.
6. In answer to the sixth interrogatory: The defendant company does not know the names of the officers or individuals referred to.

Dated this 30th day of April, 1949.

LOMAX TRANSPORTATION
COMPANY,

Now Lomax Realty Company.

By /s/ JESSE M. LOMAX,
President.

State of Washington,
County of Spokane—ss.

Jesse M. Lomax, being first duly sworn on oath deposes and says:

That he is the President of Lomax Transportation Company, now Lomax Realty Company, the defendant in the above entitled action, and makes this verification for and on its behalf; that he has read the foregoing Reply to Interrogatories, knows

the contents thereof and believes the same to be true.

/s/ JESSE M. LOMAX.

Subscribed and sworn to before me this 30th day of April, 1949.

/s/ W. V. KELLEY,

Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed April 30, 1949.

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSION
UNDER RULE 36

Comes now the defendant, Lomax Transportation Company, now Lomax Realty Company, and in reply to the Request for Admission under Rule 36 served upon the defendant by the plaintiff herein admits and denies as follows

I.

Admits that those portions of one "Certificate of Settlement" set forth in plaintiff's Request for Admission are genuine and true portions of said Certificate of Settlement.

II.

That the defendant cannot truthfully admit or deny the various items of damage and the total amount of damages set forth in said portions of the Certificate of Settlement for the reason that naval

personnel were in exclusive charge of all salvage operations and did not permit defendant or any of its agents to be present during such salvage operations, wherefore the defendant has no knowledge or belief as to the amount of said damages if any.

Dated this 4th day of May, 1949.

LOMAX TRANSPORTATION
COMPANY,

Now Lomax Realty Company.

By /s/ J. M. LOMAX,
President.

State of Washington,
County of Spokane—ss.

Jesse M. Lomax, being first duly sworn on oath deposes and says:

That he is the President of Lomax Transportation Company, now Lomax Realty Company, the defendant in the above entitled action, and makes this verification for and on its behalf; that he has read the foregoing Reply to Request for Admission under Rule 36, knows the contents thereof and believes the same to be true.

/s/ J. M. LOMAX.

Subscribed and sworn to before me this 4th day of May, 1949.

[Seal] /s/ A. H. TOOLE,
Notary Public in and for the State of Washington,
residing at Spokane.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on before the above entitled Court for hearing on this 5th day of May, 1949, Plaintiff being represented by Harvey Erickson, United States Attorney, and the defendant being represented by William V. Kelley of Witherspoon, Witherspoon and Kelley, its attorneys, and the Court having heard the testimony introduced makes the following Findings of Fact:

I.

That on or about April 22, 1946 the Lomax Fireproof Warehouses, Inc., changed its corporate name to Lomax Transportation Company and has its registered office at West 915 Second Avenue in the City of Spokane; that Lomax Transportation Company is liable for all debts, obligations and contracts of the Lomax Fireproof Warehouses, Inc.

II.

That on October 2, 1944 the Lomax Fireproof Warehouses, Inc., entered into Negotiated Contract No. N666s-231 with the United States of America, whereby Lomax Fireproof Warehouses, Inc. agreed to store certain naval supplies belonging to the Plaintiff for a period beginning October 2, 1944 and ending June 30, 1945, in its warehouse at 124 South Wall Street in Spokane, Washington.

III.

That on or about December 26, 1944 a fire occurred in the above described warehouse which resulted in destruction and loss to the Plaintiff of naval property stored in the said warehouse in the amount of \$16,415.87. No proof of Defendant's negligence was submitted.

IV.

That the contract contained a special provision providing as follows:

“Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.”

V.

That the Defendant has failed to show that there was a mutual mistake as to the inclusion of the above provision in the contract.

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That the Plaintiff have Judgment against the Defendant in the sum of \$16,415.87 plus its costs in the sum of \$37.06, without interest to the date

of entry of Judgment, with interest thereafter until paid in the sum of 6% per annum.

Dated this 6th day of September, 1949.

/s/ SAM M. DRIVER,
U.S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U.S. Attorney.

Approved as to Form:

.....

Witherspoon, Witherspoon &
Kelley,
Attorneys for Defendant.

[Endorsed]: Filed September 6, 1949.

United States District Court for the Eastern Dis-
trict of Washington, Northern Division
No. 697

UNITED STATES OF AMERICA,
Plaintiff,
vs.

LOMAX TRANSPORTATION COMPANY, a cor-
poration,
Defendant.

JUDGMENT

This matter coming on before the Court for hear-
ing on this 5th day of May, 1949, the Plaintiff be-
ing represented by Harvey Erickson, United States

Attorney, and the Defendant being represented by William V. Kelley of Witherspoon, Witherspoon and Kelley, its attorneys, and the Court having heard the testimony introduced and having considered the briefs submitted by Plaintiff and Defendant, and having made its Findings of Fact and Conclusions of Law, and it appearing to the Court from the evidence that the Plaintiff should be entitled to Judgment against the Defendant, it is therefore by the Court

Ordered, Adjudged and Decreed that the Plaintiff have Judgment against the Defendant in the sum of \$16,415.87 without interest until the entry of this Judgment and interest thereafter at the rate of 6% per annum until paid, together with its costs and disbursements in the sum of \$37.06.

Dated this 6th day of September, 1949.

/s/ SAM M. DRIVER,

U.S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,

U.S. Attorney.

Approved as to Form:

.....

Witherspoon, Witherspoon &
Kelley,
Attorneys for Defendant.

Copies mailed counsel.

[Endorsed]: Filed September 6, 1949.

[Title of District Court and Cause.]

ALTERNATE MOTION FOR JUDGMENT NOT-
WITHSTANDING DECISION AND FOR A
NEW TRIAL

Comes now defendant, Lomax Transportation Company, and moves the Court for an order in its favor dismissing plaintiff's complaint notwithstanding the decision on the ground that no proof of defendant's negligence was submitted and no competent proof of plaintiff's damage was offered, and that the contract sued upon, which contained the following special provision:

"Contractor assumes absolute responsibility for property in his possession and shall maintain bond and insurance at his own expense in accordance with the State of Washington warehousing laws." was a contract simply for a warehouseman's legal liability, but was erroneously construed by the Court to impose an insurer's liability.

Without waiving the foregoing motion and in the event the same is overruled, the defendant, Lomax Transportation Company, moves the Court to set aside said decision and for an order to amend its findings or to make additional findings and amend the judgment accordingly, or to grant a new trial to defendant, Lomax Transportation Company, upon the following grounds:

I.

Insufficiency of the evidence to justify the decision and that it is against the law.

II.

Error in law occurring at the trial and excepted to at the time by defendant, Lomax Transportation Company.

III.

Total failure of any competent proof of damage to plaintiff.

WITHERSPOON, WITHER-
SPOON & KELLEY,
/s/ W. V. KELLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 14, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT
NOT WITHSTANDING DECISION AND
FOR A NEW TRIAL

This matter coming on for hearing before the above entitled Court on this 13th day of October, 1949, plaintiff being represented by Harvey Erickson, United States Attorney for the Eastern District of Washington, and the defendant being represented by William V. Kelley of Witherspoon, Witherspoon & Kelley, its attorneys, the Court having heard the argument of counsel, it is,

Ordered, Adjudged and Decreed that the defendant's Alternate Motion for Judgment Notwithstanding Decision and for a New Trial is hereby denied.

Dated this 13th day of October, 1949.

/s/ SAM M. DRIVER,
U.S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U.S. Attorney.

[Endorsed]: Filed October 13, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named defendant, Lomax Transportation Company, now known as the Lomax Realty Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action September 6, 1949, and filed of record in the above-entitled Court on said date, and from each and every part thereof and from all rulings of the Court; and from that certain Order in the above-entitled cause signed by the Court October 13, 1949, denying defendant's Alternative Motion for Judgment Notwithstanding Decision and for a New Trial, and from each and every error of law committed by the Trial Court.

Dated this 4th day of November, 1949.

/s/ WILLIAM V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 4, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON
APPEAL

Know All Men By These Presents:

That the Lomax Transportation Company, now

known as the Lomax Realty Company, a corporation, the defendant above-named, as principal, is held and firmly bound unto the United States of America, the plaintiff above-named, in the just and full sum of \$18,000.00, for which sum, well and truly to be paid, it binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 1st day of November, 1949.

The Condition of This Obligation Is Such, That,

Whereas, the above-named plaintiff on the 6th day of September, 1949, in the above-entitled action and Court, recovered judgment against the defendant, Lomax Transportation Company, a corporation, for the sum of \$16,452.93 with interest thereafter until paid in the sum of 6% per annum, and

Whereas, the above-named defendant and principal, Lomax Transportation Company, now known as Lomax Realty Company, a corporation, has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit, and

Whereas, the above-named defendant and principal, Lomax Transportation Company, now known as Lomax Realty Company, has deposited its certified check in the sum of \$18,000.00 in lieu of a Supersedeas and Cost Bond on Appeal.

Now, Therefore, the Clerk of the District Court of the United States for the Eastern District of

Washington, Northern Division, is instructed to pay to United States of America, plaintiff above named, all costs and damages that may be awarded against said principal and defendant, Lomax Transportation Company, now known as Lomax Realty Company, a corporation, on the appeal or on the dismissal thereof, and the said Clerk is further directed to satisfy the judgment or order appealed from, and any judgment or order which the said Circuit Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said District Court of the United States for the Eastern District of Washington, Northern Division.

LOMAX REALTY COMPANY,
a corporation (Formerly LOMAX TRANSPORTATION COMPANY).

By /s/ J. M. LOMAX.

[Endorsed]: Filed Nov. 4, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO BE CERTIFIED FOR APPEAL PURPOSES
AND STATEMENT OF POINTS

Comes now Lomax Transportation Company, a corporation, (now known as Lomax Realty Company), defendant, and hereby designates the follow-

ing parts of the record and proceedings to be included in the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Summons and Complaint.
2. Defendant's Motion to Dismiss.
3. Order Denying Defendant's Motion to Dismiss signed and filed December 9, 1947.
4. Order for Pre-Trial Conference signed and entered February 11, 1948.
5. Order on Pre-Trial Conference filed February 25, 1948.
6. Amended Answer.
7. Motion to Strike a Portion of Defendant's Answer.
8. Order on Motion to Strike dated April 7, 1949.
9. Reply.
10. Pre-Trial Order signed and filed April 1, 1948.
11. Reporter's transcript of all testimony, evidence and proceedings at the trial, including the rulings of the court on the admission and exclusion of testimony.
12. Findings of Fact and Conclusions of Law signed by the court on September 6, 1949.

13. Judgment in favor of Plaintiff signed and entered September 6, 1949.

14. Alternate Motion for Judgment Notwithstanding the Decision and for a New Trial.

15. Order Denying Alternate Motion for Judgment Notwithstanding the Decision dated October 13, 1949.

16. Exhibit 1: pages 5 and 6, 19, 20 and 21 of Record of Proceedings of a Board of Investigation convened at U. S. Naval Supply Depot, Spokane, Washington, by order of Supply Officer in Command, U. S. Naval Supply Depot, Spokane, Washington, to inquire into and report on the loss of Navy property by fire in the Lomax Fireproof Warehouse, 124 S. Wall Street, Spokane, Washington, December 27, 1944. Exhibit 3, Exhibit 4, Exhibit 8 and Exhibit 11.

17. Order upon Stipulation.

18. Notice of Appeal and Bond on Appeal.

The Clerk of the above-entitled Court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated Record on Appeal.

Appellant hereby designates for consideration on this appeal the following points:

1. The liability of the defendant was that of a warehouseman. At common law in the absence of a special agreement the bailee was not an insurer nor

absolutely responsible for goods in its custody. Such liability was not enlarged by the Washington statute providing for warehouseman's liability as follows:

“The warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.” Remington's Revised Statutes §3607.

2. The defendant Warehouse Company would only be responsible for the exercise of ordinary diligence and care, but would not be responsible for loss or damage to goods caused by fire, Act of God or other causes beyond its control.

3. The contract as drawn by the Navy was ambiguous. The Navy used a Government printed form contract designated S & A Form 102 (Revised 1943) printed and used for the procurement of supplies. This printed form contract was used as a contract for the leasing of warehouse space and furnishing warehouse services and a scrivener for the Navy without legal training typed in a special provision reading as follows:

“4. a. Special Provisions: The contractor assumes absolute responsibility for property in his possession and shall maintain bond and insurance

at his own expense in accordance with the State of Washington warehousing laws.”

Defendant Warehouse Company signed the contract believing it was to be held to a warehouseman's liability only and Navy stores were destroyed by a fire without any negligence of the warehouseman.

4. The Navy could only require defendant Warehouse Company under the contract to obtain insurance at its own expense in accordance with its liability under Washington warehousing laws, and consequently the Navy could only hold the defendant Warehouse Company responsible for the exercise of ordinary diligence and care. The defendant Warehouse Company did obtain insurance covering a warehouseman's liability.

5. The contract between the Government and the defendant Warehouse Company must be interpreted in conformity with current Naval regulations which provided in part:

“Variations in the general provisions will not be made except when authorized by the Bureau of Supplies and Accounts.” Volume 1, Bureau of Supplies & Accounts Manual, page 196, Article 1061, Sec. 1.

and also

“The Navy Department has adopted a general policy of self-insurance, under which it assumes the risk of loss or damage to Government owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have

been inserted in the Government furnished material clause, and the advance and partial payment clauses. Field purchasing officers will not include any other insurance provisions in contracts without the approval of the Bureau of Supplies and Accounts, and the Assistant Secretary of the Navy, Material Division. (Procurement Branch, Insurance Section)." Volume 1, Bureau of Supplies & Accounts Manual, page 196, Article 1061, Sec. 3 (g).

6. The Navy's own interpretation of the contract was that the warehouseman could be only held for negligence as shown by its acceptance of warehouse receipts specifically providing in part:

"Received for the account of Naval Supply Depot, Velox, Washington, for storage, the goods or packages enumerated in the schedule below upon the following terms and conditions, said goods stored in warehouse located at S. 124 Wall Street, Spokane, Washington:

"The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear and handling nor for loss and damage to said goods caused by moth, fire, rust or deterioration, Act of God or other causes beyond its control." (Defendant's Ex. 11.)

and by the statements of Navy personnel in salvaging stores and in the findings of the Naval Board of Inquiry that there was no negligence involved and that recovery from the defendant Warehouse Company would be limited to its legal lia-

bility under the existing Washington warehousing laws. (Plaintiff's Ex. 1.)

7. The Government did not adduce competent proof of any damage to its stores, but merely produced a certificate of settlement of the General Accounting Office (printed Form 2042) without offering any competent proof of the correctness of figures thereon or how they were arrived at by anyone who had anything to do with the salvage of the Naval stores or the preparation of the certificate. (Plaintiff's Ex. 3).

8. The certification of this document proved only the document itself and simply permitted its introduction in evidence without further proof of identification, but such certification did not establish as a fact the correctness of statements or figures contained on the back thereof and did not sustain the Government's burden of proof.

/s/ WILLIAM V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 18, 1949.

[Title of District Court and Cause.]

ADDITIONAL DESIGNATION OF PORTIONS
OF RECORD TO BE CERTIFIED FOR
APPEAL

Comes now the United States of America, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, attorneys for plaintiff herein, and, under the provisions of Rule 75 hereby designates the following additional portions of record and proceedings to be included in the record on appeal with the United States Court of Appeals for the Ninth Circuit:

1. Bill of Particulars.
2. Requests for Admission Under Rule 36.
3. Plaintiff's Interrogatories.
4. Stipulation To Extend Time To Answer Plaintiff's Interrogatories.
5. Order Extending Time To Answer Interrogatories.
6. Reply To Interrogatories.
7. Reply to Request For Admission Under Rule 36.
8. Letter of August 3, 1949, granting judgment.

10. Court's oral ruling on Motion for Judgment Notwithstanding Decision and for a New Trial on October 13, 1949.

11. Designation of additional portions of record to be certified for the purposes of appeal.

/s/ HARVEY ERICKSON,
U.S. Attorney.

/s/ FRANK R. FREEMAN,
Assistant U.S. Attorney.
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 28, 1949.

[Title of District Court and Cause.]

COURT'S REMARKS IN RULING ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING DECISION AND FOR A NEW TRIAL

Be It Remembered that the above entitled cause came on at Spokane, Washington, on Thursday, October 13, 1949, before the Honorable Sam M. Driver, Judge of the above entitled Court, the plaintiff appearing by Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington, the defendant appearing by William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law of Spokane,

Washington, and after arguments of counsel on defendant's Motion for Judgment Notwithstanding Decision and for a New Trial, the Court ruled as follows:

The Court: As I remarked a while ago, this case has continued for a long time, and one reason it did was because of the troublesome questions presented. There were two questions that I thought were particularly difficult in this case. One of them was the construction of this contract, whether to take what appeared to be the plain language as to the liability imposed, or some of these other circumstances that indicated, well, I'd say that perhaps Mr. Lomax had made an improvident contract under the circumstances, at least it developed so after the goods were destroyed by fire. Another very troublesome problem, to me at any rate, was the matter of the offer of proving books of the General Accounting Office or the records of the General Accounting Office to establish the liability of the defendant here. I started out with the thought that it wasn't sufficient, but the cases that I was able to find seem to allow more latitude to the government in this matter of proving an account of this kind by bringing in a certified copy of the General Accounting Office records than I had supposed, and I came to the conclusion that this was *prima facie* evidence, the records of the General Accounting Office, in this case. I could very well be wrong about that.

I can see, of course, the reason for making that provision, because there's no doubt but what as a practical matter in this case and numerous similar cases where war-time transactions were concerned, the government couldn't prove its case if it couldn't prove it in this way, because we all know the numerous naval officers who had to do with this transaction, who not only made the contract, but carried on the subsequent negotiations with Lomax and examined the premises and goods and transported them back to New York where they had to be taken because there was no market for that type of goods here, those officers are not available, the government couldn't get them, they're scattered to the four winds. Of course, that isn't any reason for admitting inadmissible evidence; it merely indicates, I think, why there has been considerable latitude to the government in allowing them to prove transactions by bringing in records of the General Accounting Office.

This one I think is close to the line, but I think it is the duty of the Court to terminate litigation, and this is a short record, it wouldn't be difficult to take it up. The Court will deny the motion and allow an exception.

REPORTER'S CERTIFICATE

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and

acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on October 13, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the Court's remarks in ruling on Defendant's Motion for Judgment Notwithstanding Decision and for a New Trial.

Dated this 2nd day of December, 1949.

/s/ STANLEY D. TAYLOR,

Official Court Reporter.

[Endorsed]: Filed Dec. 7, 1949.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

Civil No. 697

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOMAX TRANSPORTATION CO., a corporation,
Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above entitled cause came on for trial at Spokane, Washington, on Thursday, May 5, 1949, before the Honorable Sam M. Driver, Judge of the above entitled Court, sitting without a jury; the plaintiff appearing by Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington; the defendant appearing by William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law of Spokane, Washington; whereupon, the following proceedings were had and done, to-wit:

The Court: You may proceed. We have had so many conferences and motions and arguments on preliminary matters here that I hardly think it would be necessary for you to make an [1*] opening statement unless you care to do so, or point out something particularly that you have in mind.

Mr. Erickson: I have nothing in mind that could not be said in argument, I think, at the conclusion probably better than now. I can state the theory of the government's case, but I think the Court is familiar with it.

The Court: I believe so; I think that I am. You may proceed, then.

Mr. Erickson: If it please the Court, I do not know what state the record of the case is in, but I propose to offer the contract as Plaintiff's Exhibit 1, between the Lomax Transportation Com-

* Page numbering appearing at bottom of page of original Reporter's Transcript.

pany and the government, and the certificate of settlement from the General Accounting Office as Plaintiff's Exhibit 2. I do believe that as a result of the pretrial orders those are already admitted in evidence, but I want to be sure and offer them at this time.

Mr. Kelley: I have here, your Honor, the original contract if the government would like to——

The Court: You're speaking now of the original storage contract?

Mr. Erickson: The storage contract.

The Court: I think that in the pretrial order of February 25, while it isn't admitted in evidence, it's stipulated that either party may offer in evidence the contract, copy of which is attached to the bill of particulars on file herein; that's [2] the same one, isn't it?

Mr. Erickson: Yes.

The Court: ——without objection as to its authenticity.

The Clerk: Here's a certified photostatic copy of it. It would be plaintiff's identification 2, because this document in the later order was marked identification 1.

The Court: Yes, that's right, that's that folder of documents, Board of Investigation File of the Navy Department, has been marked exhibit 1.

Mr. Kelley: I guess that's why we couldn't find it; we were looking for it.

The Clerk: The contract is marked Plaintiff's Identification 2.

Mr. Kelley: With respect to identification 2 of

course we would have no objection as to its authenticity. This thought occurs to me; I have the original one, and I would like to have the privilege of also offering that. It's the original contract that the parties entered into.

The Court: Well, I see no objection to that. The one you have is a photostatic copy, isn't it?

Mr. Erickson: Yes, it's under the seal of the United States as a certified copy of the contract on file in the General Accounting Office, and is admissible under the statutes, I believe, as such.

Mr. Kelley: I would have no objection, but I wanted to [3] also offer this in our case.

The Court: If there's any reason why it should go in——

Mr. Kelley: Yes, there was a reason why I wanted to offer this, on our theory of equitable reformation.

Mr. Erickson: Then I'll offer, and it is admitted without objection, 2.

The Court: Yes, identification 2 is admitted.

(Whereupon, Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Mr. Erickson: Then I will offer identification 3, the certificate of settlement from the General Accounting Office, likewise under seal of the United States, admissible under the statutes.

The Court: I think Mr. Kelley has an objection for the record on that, probably.

Mr. Kelley: I'm sorry, I didn't catch that.

The Court: That's this photostatic copy of this settlement in the General Accounting Office. I

assumed you would have an objection to that for the record.

Mr. Kelley: Yes, your Honor.

The Court: It's been discussed a number of times in preliminary proceedings here.

Mr. Kelley: Had you——

Mr. Erickson: Yes, I had offered 3.

Mr. Kelley: The defendant objects to the Plaintiff's [4] Exhibit 3 for identification on the ground that it is not competent. The certificate, whose genuineness as a certificate may be admitted, is merely a self-serving declaration based on hearsay. The seal and authentication of the Comptroller merely make Plaintiff's Exhibit 3 for identification, a photostat, merely makes it admissible equally with the original, but if the original is incompetent, so is the photostat. The certificate doesn't say anything more than the Deputy Comptroller has examined the claims and has struck a balance claimed due the United States, but the original of that wouldn't be competent evidence of damages sustained by the Navy, by the United States, in this case. The certificate, and perforce the original, doesn't state on its face the source of a single matter of fact therein set forth. The defendant isn't apprised from what source this information was derived. No government records are mentioned except at the onset that the Comptroller has "examined and settled the claims of the United States against the person named above." As I stated before to the court, we aren't concerned with

the authenticity of this document, which we admit, but rather with its competency as evidence. I realize that the court has heard extended argument in connection with the motions for summary judgment along this line, and if my memory serves me correctly just last week when we were addressing ourselves to the court on another motion your Honor indicated that perhaps now you had changed your views as to the competency of this document; I don't know to what extent, whether your Honor would rather reserve ruling until we get the evidence in, and here me on it.

The Court: Well, I think I'll admit the document in evidence with the understanding that you have the right to argue to have it stricken out at the end of the trial, and we can argue all the questions of law at one time. I might say that I quite agree with Mr. Kelley that I don't think there's anything magic about a certificate attached to a photostatic copy, that it simply gives the copy the same status as far as admission as the original; it doesn't raise it above the original; if the original is inadmissible and incompetent then the copy would be also, but of course the question here is whether the original is admissible, and I think I remarked the other day it's been a very troublesome question to me because it comes up again and again, and I have been rather reluctantly obliged to conclude that the government has greater leeway than I had any idea they had in the introduction of documents from the General Accounting Office, but I'll admit

it, and you can question it in your argument at the close of the case.

(Whereupon, Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Mr. Erickson: With the admission of those two documents we rest.

The Court: I might suggest, Mr. Kelley, I assume that you [6] wish to make a motion here for the record to question the sufficiency of the government's proof, and we might have the same arrangement on that as on this document, reserve your argument on it until the conclusion of the case.

Mr. Kelley: At this time, the plaintiff United States having rested, the defendant Lomax Transportation Company moves for a non-suit and for a dismissal of the complaint on the grounds of a total failure of proof as to any damages sustained by the plaintiff United States Government, and there being no competent evidence adduced to prove the plaintiff's complaint.

The Court: The motion will be denied.

Mr. Kelley: And by the same token, your Honor, I know that you have such a grasp on all the issues there isn't any purpose, unless you desire it, of an extended statement on behalf of the defendant.

The Court: No, I don't believe that would be necessary. As I've said, we've gone over all this matter, and I think the Court is thoroughly familiar with the defendant's position.

Mr. Kelley: Mr. Lomax, will you take the stand, please?

J. M. LOMAX

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. Will you please state your name to the Court?

A. J. M. Lomax.

Q. And you're the president of the defendant Lomax [7] Transportation Company?

A. Yes, sir.

Q. By the way, that has since this action started changed its name?

A. To the Lomax Realty Company.

(Whereupon, original storage contract was marked Defendant's Exhibit No. 4 for identification.)

Q. Mr. Lomax, directing your attention to Defendant's Exhibit 4 for identification, is that a copy of the contract involved in this suit, together with a letter of transmittal by which it was given to you?

A. Yes, it is.

Q. And directing your attention to page 4 of this contract, is that your signature, "J. M. Lomax"?

A. It is.

Mr. Kelley: I'd like to offer this in evidence.

Mr. Erickson: I object to the admission of this document unless there's some reason. If it's an exact copy of the plaintiff's exhibit, I don't see the purpose of it.

(Testimony of J. M. Lomax.)

The Court: Is the letter of transmittal on the photostatic copy also?

Mr. Kelley: No, not on the photostatic copy. I perhaps might ask some preliminary questions to aid your Honor in ruling. [8]

The Court: Well, I think that there might be—it might be a little easier to determine what the original state of this document was, and what part is printed and what part typed in, and the signatures shown——

Mr. Kelley: ——than the photostat; that was really the prime reason for offering it.

The Court: I'll admit it in evidence.

(Whereupon, Defendant's Exhibit No. 4 for identification was admitted in evidence.)

The Court: The record should show, however, that they are the same document, one is the original and one a photostatic copy, so that if there should be an appeal it shouldn't be necessary to send them both up to the higher court. Go ahead.

Q. (By Mr. Kelley): With respect to the background of this Defendant's Exhibit 4, Mr. Lomax, did the Navy send you that exhibit, give it to you?

A. Yes, they sent it to me or gave it to me.

Q. I might ask you, on or about December 26, 1944, you were engaged in the warehouse business?

A. I was.

Q. Where were you located?

(Testimony of J. M. Lomax.)

A. 124 South Wall.

Q. Did the Navy on or about that time inquire of you whether you had any warehouse space? [9]

A. Yes, they did.

Q. How many ware houses did you have at that time?

A. I had three warehouses at that time.

Q. And do you recall the individual of the Navy who made the inquiry? A. Mr. Ball.

Q. You mean Commander, or is it Captain Ball?

A. Captain Ball, I think it was.

Q. And did you have that document signed by the secretary of your company? A. I did.

Q. And who is he?

A. W. W. Witherspoon.

Q. And is that his signature on the fourth page, as secretary? A. Yes, that is his signature.

Q. You recall the fire at your premises on or about December 26, 1944, of course? A. I do.

Q. And by the way, I think it's already in the record, but whereabouts was the address?

A. At 124 South Wall Street, in Spokane, Washington.

The Court: That was December, 1944, the fire?

Q. Yes, on or about December 26, 1944, was it?

A. Yes.

Q. By the way, do you know the cause of the fire? [10] A. I do not; I do not.

(Testimony of J. M. Lomax.)

Q. After the fire did the Navy desire to salvage the materials there for war purposes?

A. Yes, they did; they asked to salvage them and take them over.

Q. On or about that time did you have insurance covering——

A. Yes, I did——

Mr. Erickson: To which—well, I'll withdraw the objection.

Q. Without going into it unnecessarily, what kind of insurance did you have?

A. Well, I had a regular Washington——

Mr. Erickson: Now, I'm going to object to going into that question any further as immaterial to the issues of this case.

The Court: I think that it would be immaterial except that I gather the purpose of it is to show or at least give circumstantial support to his contention that he didn't intend to enter into this kind of a contract; if he had insurance that didn't cover it it's more likely that he wouldn't have made this kind of a contract; is that it?

Mr. Kelley: Yes.

The Court: I'll overrule the objection.

Q. (By Mr. Kelley): What kind of insurance did you have? [11]

A. I had the regular Washington State Warehouse insurance; it's set up by the State of Washington.

Q. By the way, after this fire did you advise your insurance company of the fire?

(Testimony of J. M. Lomax.)

A. I did.

Q. And did the Navy come to the premises there and salvage the material?

A. Yes, they did.

Q. And can you indicate to the Court briefly how the Navy did that, I mean with respect to allowing outsiders in——

The Court: Pardon me; I doubt if the record is clear as to his answer on this question. I think I know what he means, but he said he had the regular Washington State Warehouse insurance. It was with a private company; he doesn't mean it was state insurance?

Mr. Erickson: I think the witness can answer the question.

The Court: You think he can, you say?

Mr. Erickson: Yes, I think so.

The Court: As to the type of insurance?

Q. (By Mr. Kelley): Did you have insurance with a private company?

A. Well, it was a private insurance company, yes.

Q. I realize this may be leading, but I know he doesn't know the name and the number and so on; was it the Phoenix Insurance Company of Hartford, Connecticut? [12]

A. Well, I rather think it was.

Q. Their policy number IM 730684, designated "Transportation Floater Policy," will that refresh your recollection?

(Testimony of J. M. Lomax.)

A. Yes, that's the policy, that's right.

Mr. Kelley: Well, I might have this marked——

The Court: Isn't the point here, I don't want to require you by any inquiry I've made to further encumber the record here with documents which are not directly concerned; I gather that the point is, this particular insurance he had insured only against damage by fire resulting from the negligence of the insured?

Mr. Kelley: That's correct.

The Court: It was not an absolute insurance of loss by fire regardless of cause?

Mr. Kelley: I'll put it this way, your Honor please; that was the position taken by the insurer, which I was going to develop.

The Court: By the insurance company?

Mr. Kelley: Yes, by the insurance company, and I don't want to inadvertently——

The Court: He doesn't want to say that he can't recover from the insurance company, I get that; well, put it this way; it was the type of insurance that you warehouse people customarily carried, wasn't it?

A. Yes, that's right, the type that warehousemen carried. [13]

Mr. Kelley: Perhaps I can reach it in another way more properly.

Q. (By Mr. Kelley): You had an insurance connection which wrote private company insurance

(Testimony of J. M. Lomax.)

coverage on your warehouse and materials on or about that time? A. Yes.

Q. And previous to the fire had you indicated to this insurance representative that you wanted complete coverage for every kind of possible loss?

A. I did.

Q. And did you explain to him that the government was storing goods in some or all of your warehouses? A. I did.

Mr. Erickson: I'm going to object to this; I can't see the purpose.

Mr. Kelley: It's leading and suggestive, I know, but it's just preliminary to this point.

Q. (By Mr. Kelley): Did you have other government goods besides what's involved in this lawsuit in some of your warehouses?

A. I did have.

Q. And had you told this insurance representative your needs as to complete insurance coverage?

A. I did.

Q. Mr. Lomax, let me pause for a minute; what business have you been in most of your life? [14]

A. In the transportation and warehouse business.

Q. You came to Spokane and worked for the old Culbertson Store? A. Yes, sir.

Q. You had one team or dray?

A. That's right.

Q. And you started in and built up your own transportation business? A. I did.

(Testimony of J. M. Lomax.)

Q. And have you ever taken any courses in insurance? A. I never have.

Q. Are you at all skilled in the matter of insurance or insurance coverage? A. No, I am not.

Q. Have you customarily in the conduct of your transportation business left those matters to insurance representatives? A. I have.

Q. Well, after the fire you say the Navy salvaged the goods up there? A. Yes, they did.

Q. And how did they do that with respect to letting outsiders in?

A. They brought their own crew in and had their own guards, and they had no one around or in there in their particular quarters; at that time the stuff was all on one floor, and [15] they had a guard on that floor, no one allowed up there.

Q. By guard do you mean marines or soldiers or sailors?

A. Well, no, at that time the government had individuals as guards, they give them a gun and put them up there as a guard.

Q. But they had a guard?

A. They had a guard.

Q. And what was the fact as to whether or not the Navy removed any of those goods while it was salvaging it?

A. Yes, they removed it as they were salvaging.

Q. Where did they take them, if you know?

A. My understanding was they took them to Velox.

(Testimony of J. M. Lomax.)

Q. Where is Velox, for the record?

A. Velox is east of Spokane.

Q. About how far?

A. About fourteen miles.

Q. From your warehouse? A. Yes.

Q. Now, did you receive a preliminary report from the Navy concerning the salvage operations?

A. I did.

(Whereupon, letter dated 2 February 1945 was marked Defendant's Exhibit No. 5 for identification.)

Q. Directing your attention to Defendant's Identification No. 5, what is that? Don't read it. [16]

A. It's the list of the stuff that they sent me after they had removed it.

Q. Who signed it?

A. It's signed here by Mr. Ball.

Q. Captain Ball? A. Captain Ball.

Q. February 2, 1945, addressed to you at 124 South Wall Street? A. That's right.

Q. I perhaps should have asked you this question preliminary to offering that. Did the Navy—when they were taking out the goods from your warehouse did they give any accounting at that time?

A. No, they did not.

Q. Subsequently you received accountings?

A. Yes.

Q. And is this Defendant's Exhibit 5 the first preliminary one you received?

A. That's the first one.

(Testimony of J. M. Lomax.)

Mr. Kelley: I'd like to offer that.

Mr. Erickson: No objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 5 for identification was admitted in evidence.)

(Whereupon, letter dated 7 April 1945 was marked Defendant's Exhibit No. 6 for identification.) [17]

Q. Directing your attention to Defendant's Exhibit 6 for identification, did you receive another subsequent accounting under date of April 7, 1945, from the Navy? A. I did.

Q. And is that it? A. This is it.

Q. And from whom did you receive that?

A. It was signed by Captain Ball.

Mr. Erickson: No objection.

Mr. Kelley: I'd like to offer that.

The Court: Six will be admitted.

(Whereupon, Defendant's Exhibit No. 6 for identification was admitted in evidence.)

(Whereupon, letter dated (no date) was marked Defendant's Exhibit No. 7 for identification.)

Q. And subsequent to that time did you receive still a third report from the Naval Supply Depot at Spokane, Washington, from Captain Ball, and is that defendant's Exhibit 7 such a report?

A. Yes, sir, I did.

Mr. Kelley: I'd like to offer it.

(Testimony of J. M. Lomax.)

Mr. Erickson: I'll object to this unless a date is fixed. There's apparently no date on it.

Mr. Kelley: I think as a matter of fact that objection would be well taken technically. It never has [18] had a date on it. I've inquired of Mr. Lomax and everybody as to the date.

The Court: Could you fix some approximate date about when it was received?

Q. (By Mr. Kelley): This exhibit 7, the Navy report in the sum of \$12,359.13, was received about how long after exhibit 6, which was a Navy report under date of April 7, 1945, in the sum of \$12,-270.35?

A. Without any date on that I couldn't say myself just when it was received, because there's no date on the papers anyplace.

Mr. Erickson: I'll withdraw the objection to it, because it's apparently received sometime after April 7.

The Court: I understood his testimony to be it was sometime after the April report, but you don't know just when, is that right?

A. No, I don't know just when.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 7 for identification was admitted in evidence.)

Mr. Kelley: Well, with respect to fixing that date I might be able to do it a little closer with this exhibit.

(Testimony of J. M. Lomax.)

(Whereupon, letter dated May 3, 1945, Fire Companies to Lomax, was marked Defendant's Exhibit No. 8 for identification.)

Q. You had notified your insurance company of the loss, I [19] believe you said?

A. Yes, I had.

Q. Of the fire? A. Yes.

Q. And subsequent to such notification did you receive any word from your insurance company with respect to their position on paying any loss?

A. Yes, I did.

Mr. Erickson: Now, to which we object as to what private arrangements he had with his insurance company. Any dispute that may have existed between the insurance company is incompetent, irrelevant and immaterial.

The Court: I'll overrule the objection. It's a trial before the court, and I can disregard it afterwards.

Q. (By Mr. Kelley): Directing your attention to Defendant's Exhibit 8 for identification, is that a letter received from your insurer subsequent to the notification of the fire and consequent loss?

A. Yes, that's right.

Q. And with respect to fixing the time of that last exhibit, this letter from the insurance company, being Defendant's Exhibit 8 for identification, makes some reference to a Naval Supply claim of \$12,270.35? A. Yes.

(Testimony of J. M. Lomax.)

Mr. Kelley: I'd like to offer Defendant's Exhibit 8. [20]

The Court: This is offered, as I understand it, merely for the purpose of fixing the date of Defendant's Exhibit 7?

Mr. Kelley: That is one of the grounds. The other ground, your Honor please, I would like to offer it on the point that the defendant's insurer denied liability under their coverage. It has a bearing, I think, on this proposition of the standard, the usual form of insurance obtained by warehousemen.

Mr. Erickson: This is a letter from Fred H. Miller of the Fire Companies Adjustment Bureau, New York, to Lomax Grimmer Warehouses, and it certainly isn't relative and material to any of the issues in this case.

The Court: Let me see it.

Mr. Kelley: I might say in explanation that I of course could call Mr. Miller of the Fire Adjustment Bureau and establish the fact that they adjusted and investigated the claims under a variety of insurance companies, one of which was the Phoenix Company involved here. I can do that. I perhaps am so familiar with that fact myself that I overlooked having him here.

The Court: Well, I'll overrule the objection and let it in.

(Whereupon, Defendant's Exhibit No. 8 for identification was admitted in evidence.) [21]

(Testimony of J. M. Lomax.)

(Whereupon, certificate of settlement was marked Defendant's Exhibit No. 9 for identification.)

Q. (By Mr. Kelley): With respect to fixing dates subsequent to the Naval report of Exhibit 7, indicating damages in the sum of \$12,359.13, did you receive some notice from the General Accounting Office of the United States Government fixing the damages at the sum of \$16,415.87, and directing—well, just answer that yes or no.

A. Yes, I did.

Q. And directing your attention to Defendant's Exhibit No. 9 for identification, what is that, or did you get that from the government?

A. This evidently came from the General Accounting Office. I am not familiar enough with the different departments to know who might have sent it, but this was received, all right.

Mr. Kelley: I'd like to offer it simply as continuity. I think it's a copy of yours.

Mr. Erickson: Yes, there's no objection.

The Court: Have you seen this, Mr. Erickson?

Mr. Erickson: Yes, no objection.

The Court: It will be admitted, then.

(Whereupon, Defendant's Exhibit No. 9 for identification was admitted in evidence.)

(Whereupon, letter dated December 13, 1946, was marked Defendant's [22] Exhibit No. 10 for identification.)

Q. Did you receive some kind of a final dun be-

(Testimony of J. M. Lomax.)

fore this suit was brought, from the General Accounting Office of the government?

A. Yes, sir, I did.

Q. And Defendant's Exhibit 10 is a letter under date of December 13, 1946, you received from the Claim Division of the General Accounting Office?

A. Well, as I say, again I don't know who might have sent it, but it came from the government, it looks like from the General Accounting Office.

Mr. Kelley: I'll offer that in evidence.

Mr. Erickson: No objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 10 for identification was admitted in evidence.)

Q. By the way, at the Naval Board of Inquiry following the fire did you attend and give testimony?

A. What was that, please?

Q. Did you attend the Naval Board of Inquiry following the fire at your warehouse, and give testimony?

A. Yes.

Q. You're one and the same individual mentioned in the Naval Board of Inquiry as J. M. Lomax?

A. Yes, sir. [23]

Q. On that occasion you told them about your insurance?

A. I did.

Q. And by the way, when you signed Defendant's Exhibit 4, Mr. Lomax, did you intend to assume any responsibility that wasn't your fault or that the insurance company would not cover?

(Testimony of J. M. Lomax.)

A. I did not. I didn't expect to sign anything that I couldn't cover by insurance.

Q. By the way, speaking of signing this contract, directing your attention to page 2 of Defendant's Exhibit 4, and specifically to the phraseology in typewriting thereon, did you do that typewriting?

A. No, I did not.

Q. Do you know who did?

A. No, I do not know who did.

Q. And directing your attention specifically to 4a, special provisions, reading "Contractor assumes absolute responsibility for property in his possession, and shall maintain bond and insurance at his own expense in accordance with the state of Washington warehousing laws" did you type that in?

A. No, I did not.

Q. Anybody at your direction and supervision do it? A. No, they did not.

Q. Did you—well, to put it bluntly, did you read this [24] contract before you signed?

A. Well, I did not read it, because I supposed it was the same as all other government contracts, and I signed a lot of contracts, and I didn't suppose the government would bring anything that was any different from the Washington state laws.

Q. Well, what I'm getting at, was there any discussion by you with anyone in the Navy or United States Government or anywhere else about the typed portions of that contract?

A. No, definitely not.

(Testimony of J. M. Lomax.)

Q. In your other contracts with the Army or other branches of the government had you had any experience with such a clause as appears under 4a, special provisions?

A. Never saw a clause like that before in any government contract.

Q. In your conduct of your warehouses, Mr. Lomax, when the Navy brought goods down to store in your warehouses would you issue any warehouse receipt? A. I did.

(Whereupon, warehouse receipt was marked Defendant's Exhibit No. 11 for identification.)

Q. Directing your attention to Defendant's Exhibit 11 for identification, can you tell the Court what that is?

A. This is a regular Washington state law warehouse receipt that was issued on each and every lot that was taken in [25] the warehouse.

Q. From the Navy?

A. From the Navy or anyone else.

Q. Does that Defendant's Exhibit 11 purport to be covering some of the goods involved in this case?

A. That does not cover anything that—it does not cover fire.

The Court: I think the—well, that's all right. I think he misunderstood the question. He wants to know whether that's a receipt on some goods actually involved in this. A. Oh, yes, this is.

Mr. Kelley: I'd like to offer it.

Mr. Erickson: I will object to it as incompetent

(Testimony of J. M. Lomax.)

and immaterial to any issue in this case. I might state further for the purpose of the record there's no showing made as to which officer in the Navy it was issued, and whether or not it was given to any of the Naval officers in exchange for goods.

The Court: Well, I think I'll admit it; the question of the effect will be for argument here.

(Whereupon, Defendant's Exhibit No. 11 for identification was admitted in evidence.)

Q. (By Mr. Kelley): Mr. Lomax, after the fire did you have a discussion with Captain Ball and another naval officer relative to salvage? [26]

A. I did. There was a conversation in my office about salvaging the stuff.

Q. And in substance what was said on that occasion with respect to whether or not the Navy could hold you responsible for the fire loss?

Mr. Erickson: Now, to which we object as incompetent and immaterial to any of the issues in this case.

The Court: I'll sustain the objection. I don't believe that any officer could waive liability for the government.

Q. On that occasion, in addition to the salvage point, did Captain Ball and this naval officer discuss this contract of yours which is Defendant's Exhibit 4 with you? A. Yes, they did.

Q. By the way, who was the other naval officer?

A. I do not remember his name. He was introduced to me as the legal authority of the Navy.

(Testimony of J. M. Lomax.)

Q. Well, your counsel at your instructions have made efforts to ascertain the identity of this naval officer?
A. They have.

Q. And you yourself have made some personal investigation?
A. Yes, I have.

Q. When were you over in Seattle before you went on your trip?

A. About the first of March. [27]

Q. Was that before you went on your trip?

A. Yes.

Q. Did you make some investigation there?

A. I did.

Q. At that time, this meeting with Captain Ball and this naval officer whom you say was introduced as a legal adviser for the Navy, what was said if anything respecting the Navy's construction of this contract and its subsequent ability to hold you liable for fire loss?

Mr. Erickson: To which we object as improper, irrelevant and immaterial to the issues in this case, what was said as to the construction of this contract by some other officer.

The Court: He wasn't the Secretary of the Navy, was he?

A. I couldn't say that.

The Court: I'll sustain the objection, then. I doubt if the Secretary could; I don't think anybody lower than the Secretary could place a construction that would be binding on the Navy contracts.

Mr. Kelley: Then simply for the record I offer

(Testimony of J. M. Lomax.)

to prove by this witness J. M. Lomax that he will testify, if permitted, that after the fire Captain Ball of the Velox Supply Depot came into his office at 124 South Wall Street and asked permission for the Navy to salvage, after [28] the Naval Board of Inquiry, and that on this occasion this witness was told in the presence of Captain Ball by the so-called legal adviser of the Navy that the defendant could not be held liable for this fire loss as the Naval Board of Inquiry had established that the origin of the fire was unknown and the findings of fact would indicate no negligence on the part of this defendant, and that the naval officer, who had been introduced by Captain Ball, acknowledged with Captain Ball in Mr. Lomax's office that the Navy in any event could not hold the defendant in this case for the fire loss.

The Court: You renew your objection, Mr. Erickson?

Mr. Erickson: Yes, I do.

The Court: The objection is sustained.

Mr. Kelley: That's the defendant's case.

The Court: You may proceed with the cross-examination.

Cross-Examination

By Mr. Erickson:

Q. Mr. Lomax, were there other letters that were received from the Navy from Captain Ball that were not offered in evidence, beside these, as to this fire loss? A. Not to my knowledge.

(Testimony of J. M. Lomax.)

Q. These are all of them?

A. To my knowledge everything I had I turned over to the attorney. [29]

Mr. Kelley: That's all I have, Mr. Erickson.

Mr. Erickson: Well, I just wanted to make sure that we had them all. I have no further questions.

(Whereupon, there being no further questions, the witness was excused.)

The Court: I don't know that this has too much to do with the lawsuit here, but I was just curious, if insurance companies have this practice of not insuring except for losses in case of negligence, how does a man who stores goods protect himself? Has he got to suffer loss if the goods burn and you don't cause the fire?

Mr. Lomax: That's what I'm trying to find out.

The Court: It seems rather queer to me that the man who stores goods in the warehouse has to take a chance on collecting for them if they're destroyed, unless he can prove that the warehouseman was negligent.

Mr. Kelley: As a proposition of underwriting, I literally turned my office upside down today to try to find the original policy with the Phoenix Insurance Company. We have here a copy of that original policy, and my partners and associates insist that that is all that we have ever had, but I was sure we had the original. I don't know whether Mr. Erickson would want to agree that this was a copy of that original policy, and simply agree that

it was a copy, but not as to any competency or [30] materiality or relevancy, and if it would help the court any——

The Court: I was just curious about that phase of it. I don't think there's any question but what the insurance company has taken the attitude they're not liable, as the documents in evidence would indicate, and apparently they claimed that there was a clause in there that didn't make them liable if the warehouseman entered into an agreement for liability beyond what the laws of Washington provide for, in the absence of special contract, and they claimed that provision was in their policy, so I don't think there's any question about their denying liability. I was just curious about the one phase of it.

Mr. Kelley: And someone in the defendant's position is placed in a most fearful position, really, because you're bound by the terms of these standard policies to cooperate to every extent, and you can't admit liability or they say you haven't any coverage, and if you dispute with them on the question of whether or no there is that coverage, you have to sue them within a limited length of time, a year or eighteen months, and a perfect example is this case; it's gone several years now, and it's really a deplorable situation.

The Court: Do you have any further testimony, Mr. Kelley? [31]

Mr. Kelley: No.

The Court: Do you have any?

Mr. Erickson: No, I haven't anything.

The Court: I think we'll take a ten minute recess.

(Short recess.)

Mr. Kelley: Your Honor, during recess I learned that I was laboring under a misapprehension that this Plaintiff's identification 1, being the general file, was not going in in toto, and that if I desired any extracts from it that I'd better offer them individually. I'd like to ask the indulgence of the Court to re-open for a moment to do that.

The Court: Yes, you may do that.

Mr. Kelley: Will you, Mr. Clerk, abstract from Plaintiff's Exhibit 1 for identification the memo of February 7, 1945, and likewise the letter of January 6, 1945, directed to the Supply Officer in Command, signed by Lomax Transportation Company; and the record of proceedings of a board in investigation convened at United States Naval Supply Depot, Spokane, Washington, to inquire into and report on the loss of Navy property by fire in the Lomax Fireproof Warehouse at 124 South Wall Street, Spokane, Washington, the date of December 27, 1944, and specifically the findings of fact and opinion thereof, and that portion of the testimony of Jess M. Lomax as set [32] forth on page 6 thereof, more specifically in words and figures as follows: "Question: What type of insurance did you carry on the contents of the building? Answer: I carried the standard type of insurance coverage as is required by the state of Washington ware-

house laws. In addition to this I carry \$15,000 additional all risk coverage”.

The Court: It may be a little hard to extract portions of pages out of there.

Mr. Kelley: Yes, that thought occurs to me. I'll offer that record of the Board of Inquiry last referred to in toto, so that it won't be mutilated, and if Your Honor deems it competent as to those portions that I offered, I'm further willing to stipulate that the court disregard the rest of it, to avoid mutilation. Would that be satisfactory?

Mr. Erickson: Yes. I don't wish to object to anything that may aid the Court, but I do not think the material in that file will be very helpful to any of the issues in the case, but I have no objection to the whole file going in.

Mr. Kelley: Well, I'll join in a stipulation for the whole file, and I'll say to the Court it has some probative value; I don't deem it controlling, at all, but it has some probative value on these two features, on the [33] question of reformation of the contract here; it indicates that Mr. Lomax—when I say Mr. Lomax I mean the defendant's good faith in securing what it apprehended to be the standard form of warehouse coverage, and secondly, it would have a bearing showing that he felt that the defendant was adequately covered and wouldn't have gone into this contract otherwise, and then finally it has some bearing as to the construction and interpretation placed on this form contract by the Navy itself as shown in their opinion.

The Court: Well, why not offer the whole exhibit, then? It's already marked as Exhibit 1, isn't it?

Mr. Kelley: Yes, I will; I'll offer the whole exhibit.

The Court: Plaintiff's identification 1, we can simply receive it in evidence then as Defendant's Exhibit 1, and it will be in evidence for reference.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was admitted in evidence as Defendant's Exhibit No. 1.)

Mr. Kelley: Secondly, as per Your Honor's pretrial order of April 1, 1948, I would inquire of counsel through the Court whether we can stipulate as to two statements contained in the Bureau of Supplies and Accounts Manual which was in force and effect at the time of the fire, on [34] or about December 26, 1944.

Mr. Erickson: That's already in the pretrial order.

The Court: Well, it's provided in paragraph 2 that the Court may take judicial notice of the Bureau of Supplies and Accounts Manual, but if there's anything that you wish to direct the Court's attention to I think it should be produced and read into the record, because it's rather a large document, isn't it?

Mr. Kelley: Yes; reading, then——

The Court: I think perhaps the easiest way to do that would be for you to simply read into the

record whatever you wish the court to take judicial notice of, and then I'll have it.

Mr. Kelley: Article 1061, entitled "Contract Provisions" page 192—would Your Honor desire me to read it, or just indicate to Mr. Taylor so he could copy it?

The Court: Well, whichever way you prefer. If you can, indicate it to him so that he can copy it, and you can make use of it in your argument then, of course, if you want to call my attention to it.

Mr. Kelley: Section 1, General provisions, commencing on page 192 and ending on page 193, and particularly and specifically the last two sentences thereof: "If the government is furnishing material to be incorporated [35] in the articles purchased, government furnished material (S & A Form 102 (3)) will be used; and if the contract is classified, the classified provisions (S & A Form 102 (4)) will be used. Variations in the general provisions will not be made except when specifically authorized by the Bureau of Supplies and Accounts."

(Reporter's Note: The full text of the section referred to by counsel reads as follows:

"All fixed price supply contracts shall contain the uniform clauses set forth in the general provisions included in the tender (S and A Form 90 (2)), and the standard two party contract (S and A Form 102 (1)), and execution sheet (S and A Form 102 (5)). They shall also contain termination provisions, either the long form (S and A Form 102 (2)) or the short form (S and A Form 102 (2A)). The

long form termination provisions are required in all contracts in excess of \$50,000, except running term contracts and contracts with other departments, agencies or instrumentalities of the Government, or with states or instrumentalities or subdivisions thereof. The long form termination provisions also may be used in any contract when requested by the contractor or when considered desirable by the contracting officer. When the long form termination provisions are not used, the short form termination provisions will be employed. If the Government is furnishing material to be incorporated in the articles purchased, Government furnished material (S and A Form 102 (3)) will be used; and if the contract is classified, the classified provisions (S and A Form 102 (4)) will be used. Variations in the general provisions will not be made except when specifically authorized by the Bureau of Supplies and Accounts."

(End of Section 1, General provisions.) [36]

Mr. Kelley: And another, for the record, Article 1061, Subsection g, on page 196 of volume 1 of Bureau of Supplies and Accounts, reading as follows:

"G. Insurance. The Navy Department has adopted the general policy of self-insurance under which it assumes the risk of loss or damage to government owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have been inserted in the government furnished material clause and the advance and par-

tial payment clauses. Field purchasing officers will not include any other insurance provisions in contracts without the approval of the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section)."

Mr. Erickson: I have a section in here I would like for the Court to consider.

The Court: Yes, all right.

Mr. Erickson: It is Section 1071 of the Bureau of Supplies and Accounts Manual, Amendments and Modifications of Contracts. It reads as follows:

"Operating under the authority of the First War Powers Act and Executive Order 9001, contracting or purchasing officer may, upon agreement of both parties, make contract amendments or modifications to the same [37] extent and in the same manner as original contracts, subject to the limitation set forth in paragraph 2. All amendments and modifications shall be made in writing and shall be accepted by the contractor. No special form need be employed for this purpose, but the form used should contain the contractor's acceptance and a recital that the amendment is made pursuant to the First War Powers Act, and will facilitate the prosecution of the war. Copies of amendments and modifications shall be distributed to the same addressees as the original purchase documents."

And in subsection 4 of the same article, 1071, entitled "Amendments to correct mutual or apparent mistakes" reading as follows:

“Amendments to correct mutual or apparent mistakes may be made by contracting officers when approved by the Bureau of Supplies and Accounts. ‘Mutual mistakes’ are defined as mistakes due to failure to express in the written document the negotiated agreement as both parties understood it, and ‘apparent mistakes’ as those mistakes which are so obvious that they should have been apparent to the purchasing officer. When it is desired to relieve contractors from such mistakes, a complete statement of facts shall be submitted to the Bureau of Supplies and Accounts.”

And subparagraph 5, entitled “Amendments, modifications and extensions of completed contracts”: [38]

“Except for the change orders made pursuant to the provisions of the contract, purchasing officers shall not amend, modify or extend completed contracts without the approval of the Bureau of Supplies and Accounts and the office of Procurement and Material. Completed contracts are those under which all work which is required to be done to entitle the contractor to final payment has been performed. If the proposed amendment, modification or extension of the completed contract is supported by consideration, a new contract normally should be made.”

And subsection 6:

“Matters which give rise to contract amendments or modifications: Questions raised as to the propriety, correctness, adequacy or clarity of contract provisions shall be disposed of prior to the execu-

tion of the contract when possible. In no instance should a contracting officer execute a contract when at the time of execution he intends to recommend an amendment without consideration. When contractors express dissatisfaction with the provisions of open contracts, purchasing officers should direct them to file application for amendment or modification immediately. In no case should a purchasing officer suggest or acquiesce in the delay in the presentation of such application until completion of the contract."

Mr. Kelley: Your Honor, being a little uncertain [39] as to the exact status of the excerpts read by myself or Mr. Erickson, just for the record I'd object that all the excerpts to which Your Honor's attention has been directed by counsel for the government are incompetent, irrelevant and immaterial, on the specific grounds that the defendant is praying for a reformation of his contract in a court of law, and while we readily grant the authenticity of these administrative rulings, we submit that they are not the exclusive remedy.

The Court: I think the provision in the pretrial order is that the Court can take judicial notice of any pertinent provision of this Bureau of Supplies and Accounts Manual, and the matter of the pertinency will have to be passed on by the Court. In other words, I think the thing to do is call it to my attention, and then I can decide along with the issues in the case how much weight to give to the various excerpts.

Mr. Erickson: I assume the plaintiff will make the first argument?

The Court: I understand both sides have rested, and it seems to me the way this lawsuit has developed the burden is really on the defendant on the affirmative matter presented, so I'll hear from Mr. Kelley first.

Mr. Kelley: Well, for the record we would renew, if Your Honor pleases, our motion for nonsuit, and both [40] sides having rested, we renew our motion for dismissal of the government's complaint on the grounds of a total failure of proof as to any damages sustained, and that there has been no competent evidence adduced in support of the government's case either as to liability or damage.

(Whereupon, counsel for defendant and plaintiff presented arguments to the Court.)

The Court: It's been some time since I looked at these cases cited in the briefs that were submitted; it's been some time since I looked them over, and particularly in view of the fact that attention has been called to the new judicial code which came into effect in September, I don't know that there's been any substantial change there, but I would like to look at that and look at some of these cases again before I make a final decision in this case. I haven't in mind writing any memorandum opinion; I'll simply notify you by telephone or letter when I have made up my mind, so you can present your findings, but I do want to look at that statute and some of these cases, and decide the case

I hope in the next week or two. I think I have all of your citations here; I'll not ask for briefs, you've briefed it before. If there's nothing else the Court will adjourn until Monday morning at 10 o'clock.

(Whereupon, the Court adjourned.) [41]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on May 5, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein, omitting only the arguments of counsel to the Court at the conclusion of such trial.

Dated this 2nd day of December, 1949.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

Copy received Dec. 7, 1949.

/s/ HARVEY ERICKSON,
U. S. Attorney.

[Endorsed]: Filed Dec. 7, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the annexed and foregoing is the Original

Complaint; Summons and Return of Service Thereof; Defendant's Motion to Dismiss; Order Denying Motion to Dismiss, etc.; Bill of Particulars; Order for Pre-Trial Conference; Order on Pre-Trial Conference; Amended Answer; Motion to Strike Portion of Answer; Order on Motion to Strike; Pre-Trial Order; Reply; Requests for Admission Under Rule 36; Interrogatories; Stipulation to Extend Time to Answer Interrogatories; Order Extending Time to Answer Interrogatories; Reply to Interrogatories; Reply to Request for Admission Under Rule 36; Record of Proceedings at Trial; Exhibits and Stipulation Regarding Making Document Part of Exhibit "1"; (exhibits not attached hereto); Findings of Fact and Conclusions of Law; Judgment; Alternate Motion for Judgment Notwithstanding Decision and for New Trial; Court's Remarks in Ruling on Above Motion; Order Denying Motion for Judgment Notwithstanding Decision and for New Trial; Notice of Appeal; Supersedeas and Cost Bond on Appeal; Appellant's Designation of Portions of Record, and Statement

of Points; Appellee's Designation of Additional Portions of Record; and in the cause of United States of America vs. Lomax Transportation Company, No. 697.

That the above and foregoing constitute the record on Appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered by the District Court in the above named District and cause.

In Witness Whereof, I have hereunto set my hand and seal of said court this 10th day of December, 1949.

[Seal] /s/ A. A. LaFRAMBOISE,

Clerk of the United States District Court for the Eastern District of Washington.

[Endorsed]: No. 12422. United States Court of Appeals for the Ninth Circuit. Lomax Transportation Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 13, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 12422

UNITED STATES OF AMERICA,

Appellee,

vs.

LOMAX TRANSPORTATION COMPANY, a
corporation,

Appellant.

DESIGNATION OF POINTS AND THE RE-
QUEST FOR PRINTING OF RECORD

I.

Appellant hereby adopts and designates for consideration on this appeal, in lieu of a separate statement, the designation of points on which it intends to rely heretofore designated by appellant and filed in the District Court.

II.

Appellant deems consideration by the court of all of that record, certified to this court by the clerk of the District Court, necessary to this appeal to a proper understanding of the questions presented and hereby requests that same be printed, excepting

and omitting formal parts of pleadings and other court papers.

WITHERSPOON, WITHER-
SPOON & KELLEY,

/s/ WILLIAM V. KELLEY,

Attorneys for Lomax Transportation Company,
Appellant.

Service of the foregoing designation of points relied on and request for printing, by receipt of a copy thereof, is hereby accepted this 20th day of December, 1949.

/s/ HARVEY ERICKSON,

United States Attorney,
Attorney for United States of America, Appellee.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington
Northern Division*

WITHERSPOON, WITHERSPOON AND KELLEY,
WILLIAM V. KELLEY,

1114 Old National Bank Building,
Spokane, Washington,

Attorneys for Appellant.

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NO. 12,422

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington
Northern Division*

WITHERSPOON, WITHERSPOON AND KELLEY,
WILLIAM V. KELLEY,
1114 Old National Bank Building,
Spokane, Washington,
Attorneys for Appellant.

JURISDICTION

This action was brought by the appellee, the United States of America, hereinafter called the "Government," against appellant, Lomax Transportation Company, which is and was liable for all duties, obligations and contracts of the Lomax Fireproof Warehouses, Inc., which on or about April 22, 1946, had changed its corporate name to Lomax Transportation Company, a corporation. The corporations were and are citizens and residents of the State of Washington. Appellant is hereinafter called the "Warehouse Company". The action was predicated upon a certain printed form contract covering the storage of certain Naval supplies belonging to the Government for a period beginning October 2, 1944, and ending June 30, 1945, in the warehouse of the Warehouse Company in Spokane, Washington, and for fire losses and damage to said stores in the sum of \$16,415.87, sought to be proved by a certified copy of Certificate of Settlement of the General Accounting Office, Form 2042 (Revised).

The controversy was, therefore, a controversy which at the time of the commencement of the action was and still is between the United States of America as appellee and a citizen of the State of Washington as appellant on a contract drawn by the former, and the amount in controversy is and was at the time of the commencement of the action in excess of \$3,000.00, and involves the construction of certain Federal Statutes which became effective September 1, 1948, including Chapter 646, Public Law 773, Sections 38 and 39, 80th Congress (Title 28 U.S.C.A., Judicial Code, Section 1733).

Jurisdiction of the District Court existed under Section 41, Title 28 U.S.C.A., Judicial Code, Section 24 amended. The

appeal to this Court is from the final judgment decreeing that appellee, plaintiff below, have judgment against appellant, defendant below, in the sum of \$16,415.87 with interest at the rate of 6% from September 6, 1949, and from an order denying defendant's alternate motion for judgment notwithstanding the decision and for a new trial entered the 13th day of October, 1949. Notice of appeal was filed in the Office of the Clerk of the District Court on the 4th day of November, 1949, and jurisdiction is believed to exist under Section 225 (a) and (d) Title 28 U.S.C.A. and (d) Title 28 Section 225 (a) and (d) Title 28 U.S.C.A., Judicial Code, Section 128 amended. (Tr. 57 to 59).

STATEMENT OF THE CASE

On October 2, 1944, the Lomax Fireproof Warehouses, Inc., a Washington corporation, agreed to store certain Naval supplies belonging to the United States Government for a period beginning October 2, 1944, and ending June 30, 1945, in its warehouse at 124 S. Wall Street in Spokane, Washington. A printed form contract designated as S and A Form 102 (Revised 1943) was used as the instrument outlining the rights and duties of the parties. (Ex. 1, Tr. 8-28). This printed form of contract was usually used for the procurement of supplies, but in this case the Government sought to adapt it to the leasing of warehouse space. A Naval scrivener apparently without any legal training (Ex. 1. Stipulation of Dec. 8, 1950) typed in a special provision reading as follows:

“4. SPECIAL PROVISIONS. A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.”

and the appellant Warehouse Company signed the contract (Tr. 91, 92) believing it was to be held to a warehouseman's liability under existing warehouse laws of the State of Washington. The Government would transfer its Naval stores at the Velox Depot outside the City of Spokane to the warehouse of the appellant in Spokane and each time receive a warehouse receipt (Tr. 93) specifically providing in part concerning the liability of the Warehouse Company as follows:

“Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following

terms and conditions, said goods stored in warehouse located at No. 124 S. Wall Street, Spokane, Washington.

"The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Ex. 11, Tr. 93)

On December 26, 1944, a fire occurred in the warehouse which resulted in the destruction of certain Naval stores. (Tr. 79). A short time after the occurrence of the fire, a Navy Board of Inquiry investigated the causes and found there was no apparent negligence on the part of the Warehouse Company and further that recovery from the appellant Warehouse Company should be limited to the appellant's legal liability under existing warehouse laws of the State of Washington. (Tr. 95, 96, Ex. 1). Appellant Warehouse Company carried insurance against damage by fire resulting from its negligence. (Tr. 82). This type of insurance was the kind customarily carried by warehousemen in Washington. (Tr. 82). The Warehouse Company when it signed the printed form contract, (Ex. 4) understood that the legal consequences thereof would be that it would only be responsible for the exercise of ordinary diligence and care and would not be responsible for loss and damage to goods caused by fire, Act of God or other causes beyond its control. (Tr. 91, 92). No proof of any negligence on the part of the Warehouse Company was submitted by the Government, but it sought to prove its damages by a Certificate of Settlement of the General Accounting Office (printed form 2042) (Ex. 3) without offering any proof as to the correctness of the figures thereon or as to how they were arrived at by anyone who had anything to do with the salvage of the

Naval stores or the preparation of the certificate. (Tr. 71-76). This Certificate of Settlement stated the total amount due the United States to be \$16,415.87, for which sum the trial court entered judgment against the appellant. It was apparently the theory of the trial court that no mistake or ambiguity existed in the contract and that the Certificate of Settlement was competent proof of the damages sustained. (Ex. 6). (Tr. 107).

SPECIFICATIONS OF ERROR

1. The District Court erred in denying defendant's motion to dismiss plaintiff's complaint, which order was signed and filed December 9, 1947.

2. The District Court erred in granting plaintiff's motion to strike in part paragraph III of defendant's amended answer, which order was signed and filed April 7, 1949.

3. The District Court erred in refusing to admit in evidence the findings of fact of the Naval Board of Inquiry to the effect that recovery from the contractor under his insurance would be limited to his legal liability under the existing Washington Warehouse Laws, and that there was no apparent negligence on the part of the defendant. (Plaintiff's Ex. 1. Tr. 96).

4. The District Court erred in admitting and considering in evidence over defendant's objection the Certificate of Settlement of the General Accounting Office (Plaintiff's Ex. 3) for the purpose of providing that the Government sustained damages and the amount thereof. (Tr. 73-76).

5. The District Court erred in denying defendant's motion for a non-suit and for a dismissal of the complaint on the ground of a total failure of proof as to any damages sustained by plaintiff. (Tr. 76).

6. The District Court erred in rendering and entering the final judgment in the sum of \$16,415.87. (Tr. 52, 53).

7. The District Court erred in denying defendant's alternative motion for judgment notwithstanding the decision and for a new trial. (Tr. 55, 56).

ARGUMENT

I.

WAREHOUSEMAN'S LIABILITY UNDER THE
CONTRACT

Specifications of Error 1 to 3 deal with what appellant conceives to be the wrongful interpretation by the Trial Court of the contract, and for the convenience of the Court, we will discuss these specifications together.

WAREHOUSE COMPANY NOT AN INSURER

Appellant was a warehouse company although the District Court construed the contract to make the appellant an insurance company. At common law, in the absence of special agreement, a bailee such as the appellant Warehouse Company was not an insurer nor "absolutely responsible" for goods in its custody. See *Mill Factors Corp. vs. Ming Toy Dyeing Co.*, 41 *F. Supp.* 467. Such liability was not enlarged by the Washington statute providing for warehouseman's liability, which is as follows:

"A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care." *Remington's Revised Statutes* §3607.

The District Court in effect construed this contract to be one of insurance rather than one for warehousing.

For a better understanding of this effect, we would refer to the definition of "insurance," as set forth in *In Re Knight's Estate*, 31 *Wn.* (2d) 813 at 816, 199 *P.* (2d) 89.

PRINTED CONTRACT DID NOT MAKE
WAREHOUSE COMPANY INSURER

The contract itself in Article 10 thereof provided in part:

“the Contractor shall not be charged with any liability for failure or delay in delivery or performance when such failure or delay is due to causes beyond the control and without the fault or negligence of Contractor, including but not restricted to (1) acts of God or of a public enemy, (2) acts of the Government of the United States or any State or political subdivision thereof, (3) fires *****” (Tr. 17, 18)

Certainly the use of this language does not indicate the intention to impose an insurer's liability.

EFFECT OF TYPEWRITTEN PROVISION 4. A.

The printed contract had a special typewritten provision 4. A. that reads as follows:

“4. Special Provisions.

A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.” (Tr. 20)

As near as can be ascertained from the record, this was dictated by one C. T. McCormack, Jr., who signed the letter of transmittal accompanying the printed contract, which did not appear on the photostatic copy offered by the Government (Tr. 78), but does on the original document (Defendant's Ex. 4). If McCormack was the scrivener, it is undisputed that his personnel officer qualifications show that he had no legal training. (Tr. 61 and Stipulation December 8, 1949, relating to defendant's Ex. 1). The District Court held that the effect of this typewritten clause was to make the Warehouse Company an insurer. Was this a proper construction? We are not favored with the Court's

reason for his holding in his short memorandum opinion: Whether he believed as a matter of law that the written contract under no circumstances could be reformed because there was no testimony that the scrivener McCormack (whom the Government never called) was mistaken or whether the Court did not believe appellant's testimony (which was the only testimony on the point) that, as a matter of fact, that all that was intended to be imposed was a warehouseman's liability. (Tr. 107).

Admittedly, the special typewritten provision 4. A. itself was only made ambiguous by the use of the single word "absolute". But was even this intentional? The District Court refused to consider the evidence that by operating under warehouse receipts provided for in 4. Special Provisions C. of the contract, the Supply Officer in Command of the Navy Supply Depot and the Warehouse Company in fact interpreted the contract themselves as one under which the appellant could only be held to a warehouseman's liability under the Washington Warehousing Laws. The District Court apparently disregarded testimony on the part of the appellant that all that was meant by the parties was to hold the appellant to a warehouseman's liability under the Laws of the State of Washington. (Tr. 91, 92) J. M. Lomax, President of the Warehouse Company testified:

"Q. Did you—well, to put it bluntly, did you read this contract before you signed?

"A. Well, I did not read it, because I supposed it was the same as all other government contracts, and I signed a lot of contracts, and I didn't suppose the government would bring any thing that was different from the Washington state laws.

"Q. Well, what I'm getting at, was there any discussion by you with anyone in the Navy or United

States Government or anywhere else about the typed portions of that contract?

“A. No, definitely not.” (Tr. 92)

If an insurer’s liability would result from the use of the single word “absolute” such a result under this evidence was a mistake and the contract should be reformed.

RULES OF CONTRACTUAL CONSTRUCTION

Irrespective of his reasons, the District Court by all the rules of interpreting the scope and meaning of contracts should not have construed the 4. A. clause to impose an insurer’s liability. To do so he had to treat that whole second portion of the paragraph after the word “possession” reading “and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws” as mere surplusage, so that the clause would read according to the Court’s interpretation: “Contractor assumes absolute responsibility for property in his possession.”

CONTRACT TO BE CONSTRUED AS A WHOLE

At the onset it would be well to consider several general principles which were perhaps not sufficiently emphasized to the District Court. A contract is construed as a whole and so as to give effect to all of its parts. 17 *C.J.S. Contracts* §297, page 707. 3 *Williston on Contracts (Revised Edition)* §618, page 1779. As we have pointed out, Article 10 of the printed contract provided that the “Contractor” [Warehouse Company] was not to be “charged with any liability for failure when such failure is due to causes beyond the control and without the fault or negligence of contractor [Warehouse Company] (Tr. 18). In addition to the above portion of the phraseology of Article 10, the contract also contains the following Special Provision 4. C. reading:

"The contractor shall furnish to the Supply Officer in Command, Naval Supply Depot, Spokane, Washington, *Bonded Warehouse Receipts* for all materials in storage," (Italics ours), (Tr. 21)

The "Bonded Warehouse Receipts" used read as follows:

"Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following terms and conditions, said goods stored in warehouse located at No. 124 Wall Street, Spokane, Washington.

"The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Ex. 11, Tr. 93).

All these parts of the contract, to say nothing of the latter part of paragraph 4. A. itself would be meaningless if the contract were construed to impose an insurer's liability.

CONTRACT WAS FOR WAREHOUSING AND NOT INSURANCE

Secondly, one of the main purposes of the contract was to provide:

"For necessary services as may be required for the balance of the fiscal year 1945, beginning 2 October 1944 and ending 30 June 1945, in connection with *warehousing* Navy stores." (Italics ours). Article 10.

APPELLANT'S INTERPRETATION REASONABLE

Again, a contract should be interpreted so that it shall be effective and reasonable. 3 *Williston on Contracts* (Revised Edition) §620. It is unreasonable and unfair to suppose that a warehouse company which had a certain type of insurance coverage would of itself assume an insurer's liability when the services and materials to be performed and fur-

nished were unknown. The contract itself specifically provides in Article 10, sub-section 1:

“Such services and materials, including, but not by way of limitation, warehousing space **** as required.” and again under the caption “UNCERTAIN AND VARYING NEEDS OF THE NAVY”:

“The uncertain and varying needs of the Navy (or Government) make it impossible to determine the quantity or quantities of the articles and material described herein that may be required during the contemplated period of the contract. *****”

Even if the insurance laws had permitted it, the appellant would not have undertaken an insurer's risk at the contract rate. Obviously it could not have covered itself by insurance for “absolute responsibility” except at prohibitive rates. This cost it could have been expected to include in the contract rate charged the Government. The Government recognized this and the Navy had simply adopted a policy of self-insurance for the purpose of keeping down its contractual costs. See *Naval Regulations, Volume 1, Bureau of Supplies & Accounts Manual, Art. 1061 3. (g).*

CONTRACT WAS DRAWN BY GOVERNMENT

In the fourth place, if the use of the single word “absolute” in Special Provision 4. A. renders the contract's meaning ambiguous, the language of the contract should be interpreted more strongly against the party using it. 3 *Williston on Contracts (Revised Edition)* 621. The ambiguous word “absolute” was apparently drafted by one C. T. McCormack, Jr., (letter of transmittal, Defendant's Ex. 4), a scrivener unversed in the law, as shown by the record of McCormack himself indicating that he was an assistant supply officer who was neither a legal officer nor legally

trained. (Plaintiff's Ex. 1 and Stipulation Regarding Making Document part of Exhibit "1"). Whether McCormack's mistake was one of fact or of law should make no difference. The rule itself which distinguishes mistake of law from mistake of fact is founded on no sound principle. The Federal Courts have recognized the difficulty of coordinating all the cases so as to produce satisfactory results. See *Clifton Mfg. Co. v. United States*, 76 F. (2d) 577 at 579. As one text writer has stated:

"There is no portion of the law of mistake more troublesome than that relating to mistake of law, by which is meant either ignorance of rule or principle of law or an erroneous conclusion as to the operation of law upon a known set of facts." *Williston on Contracts* §1581.

EXISTING LAW IS PART OF CONTRACT

In the fifth place, existing laws always form a part of a contract. 3 *Williston on Contracts (Revised Edition)* §615. Here there were positive Naval Regulations indicating that the Government would have no right to enter into a contract *for insurance* of Naval stores and that the Navy itself was a self-insurer. By Pre-Trial Order of April 1, 1948, the Trial Court should have taken judicial notice of any pertinent portion, provision or article of that official publication of the Navy Department known as the Bureau of Supplies & Accounts Manual, which provided in part as follows:

"The Navy Department has adopted a general policy of self-insurance, under which it assumes the risk of loss or damage to Government-owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have been inserted in the Government-furnished material clause and the advance and partial payment clauses. Field purchasing officers will not include *any other insurance provisions* in contracts

without the approval of the Bureau of Supplies & Accounts and the Assistant Secretary of the Navy, Material (Procurement Branch, Insurance Section.” (Italics ours)

Captain J. M. Ball, Supply Officer in Command, had no authority to impose the absolute liability of an insurer upon the appellant Warehouse Company as the District Court construed the contract. Such a construction by the Trial Court that the Supply Officer could impose an insurer's liability in effect was a holding contra to the self-insurance provisions and the provision for the necessary approval of the Bureau of Supplies & Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section). Another portion of the Naval regulations, Section 1, specifically holds that variations in the general provisions will not be made except when authorized by the Bureau of Supplies & Accounts and no such special authorization was ever pleaded or proved by the Government in the case at bar. To interpret the contract as the District Court did to impose an insurer's liability on what the contract itself called the “uncertain and varying needs of the Navy” would be to interpret the contract as a wagering contract in contravention to public policy and permit any company including the appellant Warehouse Company to become an insurer without submitting to the regulations of insurance companies in the State of Washington, the Supreme Court of which has recently held:

“ ‘Insurance’, in its general sense, may be defined as an agreement by which one person, for a consideration, promises to pay money or its equivalent, or to perform some act of value, to or for the benefit of another person, upon the destruction, death, loss, or injury of someone or something as the result of specified perils. 29 Am. Jur. 47, Insurance, §3; 44 C.J.S. 471, Insurance, §1; 1

Joyce, Law of Insurance 73, §2. In §.01.04, p. 189 of the present insurance code of the state of Washington, Laws of 1947, chapter 79, p. 189, 'insurance' is defined as a *contract* whereby one undertakes to indemnify or pay a specified amount to another upon determinable contingencies." *In Re Knight's Estate*, 31 Wn. (2d) 813 at 816, 199 P. (2d) 89.

CONDUCT AND ACTS OF PARTIES

Finally, an interpretation given by the parties themselves will be favored. 3 *Williston on Contracts (Revised Edition)* §623. Assuming arguendo that the use of the word "absolute" in 4. A. could impose an insurer's liability, the parties themselves never operated on that principle. Warehouse receipts were provided for in 4. SPECIAL PROVISIONS. C. of the contract. These were furnished for all the vast amount of goods stored and these warehouse receipts specifically provided in part concerning the liability of the appellant company as follows:

"Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following terms and conditions, said goods stored in warehouse located at No. 124 S. Wall Street, Spokane, Washington.

"The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Ex. 11, Tr. 93).

The District Court was apparently unimpressed by the interpretation given the parties themselves as shown by the multitude of goods delivered pursuant to this warehouse receipt form. Not only these acts, but the declaration of the parties themselves should have been considered, such as the testimony of Jesse Lomax that a legal officer of the Navy

informed Captain Ball in his presence that the appellant Warehouse Company could only be held for negligence. (Tr. 96). The conduct and declaration of the parties may always be evidence of the subsequent modification of their contract. Yet the Trial Court refused to admit in evidence the findings of the Naval Board of Inquiry to the effect that recovery from the contractor under his insurance would be limited to his legal liability under the existing Washington Warehouse Laws and that there was no apparent negligence on the part of the appellant. (Plaintiff's Ex. 1, Tr. 96)

II.

NO COMPETENT PROOF OF DAMAGE

Specifications of Error 4, 5, 6, and 7 deal with what appellant conceives to be the error of the Trial Court in holding that the Government had produced competent proof of damages. The Government did not offer any Navy personnel who salvaged the damaged stores or any other employees, agents or officials of the Government who took part in such salvage. While the contract did not provide for salvage by the Navy as such in case of fire, Article 10 thereof, which provided that the contractor would not be charged for fire loss without negligence, contained a provision to the effect that the contractor (the party in the same position as the appellant Warehouse Company) should notify the Navy (or Government) of the cause of "such excusable failure" to procure materials. The Government was notified of the fire and shortly thereafter requested the right to salvage and this right was granted by the appellant Warehouse Company. (Tr: 81, 84). The Navy brought its own crew in and the salvage operations took place under armed guards. (Tr. 84). Appellant Warehouse Company had no part in

these salvage operations and the goods were removed by the Navy as they were salvaged, (Tr. 84), without any accounting made to appellant Warehouse Company at that time.

There was no provision in the contract for salvage and the only part thereof that had even the remotest reference to procedure on loss was Article 10 of the contract, which stated in part that:

—“Promptly on receipt of such notice, the contracting officer shall ascertain the facts and extent of the failure or delay, and if he shall find that the failure or delay was occasioned by causes beyond the control and without the fault or negligence of the Contractor, he shall accordingly extend the time of delivery or performance or otherwise revise the delivery schedule. The finding of fact of the contracting officer shall be final and conclusive, ***” (Tr. 19)

A Naval Board of Inquiry shortly thereafter made a finding of no negligence, the fire being of unknown origin. (Plaintiff's Ex. 1, Tr. 96). Thenceforth the Warehouse Company had nothing to do with the goods and was not apprised of any claim by the Navy until February 2, 1945. (Defendant's Ex. 5). However, from time to time it received interim reports in varying and increasing amounts as to the amount of the damages. (Defendant's Ex. 6-7). After the second claim, which was for \$12,270.35, as of April 7, 1945, appellant referred to its insurer this claim of the Naval Supply Depot which was subsequently rejected on May 3, 1945. (Defendant's Ex. 8).

At the trial the Government's claim amounted to \$16,415.87. To prove this claim the Government did not offer any Navy personnel who salvaged the goods, any employee, agent or official of the Government who could testify

as to the correctness of the figures or how they were arrived at, but simply offered in evidence a certified copy of a so-called "Certificate of Settlement" of the General Accounting Office under date of November 12, 1946, which stated in part that the appellant Warehouse Company was indebted to the United States in the sum of \$16,415.87 as shown by a statement on the back of said Certificate. (Plaintiff's Ex. 3, Tr. 4). No individual, agent or employee of the General Accounting Office was produced to testify as to the correctness of such statement or how the figures were arrived at by anyone who had anything to do with the salvage of the Naval stores and the preparation of the Certificate. No books or records of the Navy Department, Bureau of Supplies and Accounts, General Accounting Office or any other branch of the Government or copies thereof were offered.

Obviously during the salvage operations appellant Warehouse Company had no opportunities to examine the property or determine the nature and extent of the damage and it has never been given an opportunity to have its representatives examine into any of those features. Nor has any representative of the Government with any personal knowledge of the facts been presented for cross examination as to these facts. Presumably the General Accounting office received reports from some source containing statements of someone conversant with these facts. Not even these reports which might have probative value as to the kind and quantity of the property stored and removed, and as to the physical facts concerning the nature and extent of damage were offered. Presumably the records of some office in the Navy department or the General Accounting office might have shed light on the value of the various items

of property, based upon their cost to the Government, but none were ever offered by the Government.

The appellant Warehouse Company admitted the authenticity of Exhibit 3, but objected to its competency as evidence of damage. Thus the principal question before the Court on this phase of the case is whether the "Certificate of Settlement" is a competent document with which to prove damages. It is, of course, patent that such Certificates could not be cross-examined. The question of admissibility of this Certificate for the purpose of proving the fact that the Government sustained a fire loss damage and the amount thereof is controlled by either 28 *U.S.C.A.* 1732 or 1733 of the new Judicial Code, which became effective September 1, 1948, during the pendency of the case at bar. The former controlling sections were 28 *U.S.C.A.* 661 and 665, which were repealed by Act June 25, 1948, C. 646, Sec. 39.

COMPARISON OF 28 *U.S.C.A.* 1732, 1733

WITH OTHER STATUTES AND RULES:

However, 28 *U.S.C.A.* 661 (repealed) was the same as the new 1733 (b) and it simply provided that "properly authenticated" copies of Government papers may be admitted in evidence equally with the originals thereof.

28 *U.S.C.A.* 665 (repealed) was limited to suits against revenue officers or others accountable for public moneys. There is no similar restriction in Section 1733. *Federal Rule of Procedure* 44 as to the proof of official record following 28 *U.S.C.A.* 723c appears to remain in force.

31 *U.S.C.A.* 46 appears unaffected by the new code, but simply provides that authenticated copies of records or transcripts thereof from Comptroller General's office will be

admitted with the same effect as 28 *U.S.C.A.* 661 and 665.

31 *U.S.C.A.* 52 (*d*) and (*e*) permit a deputy to make the authentication. These sections neither add to nor detract from the new section 1733 of *Title* 28, which reads as follows:

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

The question for this Court to decide is whether Plaintiff's Exhibit 3, the Certificate of Settlement, is a competent document with which to prove damages in the case at bar.

The loss in value of the goods through their being damaged is necessarily a matter of opinion; such opinions must be supported by proper foundation under elementary rules of evidence applicable to determination of values.

But, disregarding for the present the lack of any foundation for introduction of the purported evidence of extent of damage, the introduction of the certificate to show quantity and kind of goods stored falls far short of having any support in statutes or decisions of any court.

We do not know whether it was 28 *U.S.C.A.* 1732 or 1733 upon which the Trial Court relied in admitting this certificate. If it complies with either and if either statute authorizes its admission, it has gone far beyond any rule of evidence accepted by court decisions or any previous statute

enacted by the Congress or by any state legislature. The notes of the Reviser (appearing at pp. 1701 et seq. of West Pub. Co. Cong. Service, 1948, paper ed., in connection with the Senate and House Committee Reports on the bill for revision of the Judicial Code, P. L. 773 of the 80th Congress, at pp. 1871-2) show that Section 1732 is merely a restatement of the old 28 U.S. C. Sec. 695; and that Sec. 1733 is merely a consolidation of the old Secs. 661-667 and 671 of the 1940 U.S. Code. There is no intimation that the revision broadened any preexisting rule except to include "any department or agency" of the government, instead of merely those mentioned by name in previous statutes.

However viewed this certificate was no writing or record made in the usual course of business within the "shop book rule" stated in Sec. 1732, or in any court decisions defining such rule, nor is it either a "memorandum or record of any act, transaction, accrual or event" pertinent to the case at bar. Nor is it a "book or record of account or a minute of any proceeding" pertinent to the ultimate facts here. It is mere recital, purporting to be signed by some unidentified person, (whether or not an official thereunto authorized does not appear) in the name of the Comptroller General of the United States, stating that he has examined the "claims" of the Government against the appellant Warehouse Company and finds due from the latter a specified sum under a contract for storage of navy stores, which the Comptroller General construes to impose a certain liability on appellant Warehouse Company and under which he peremptorily concludes it is indebted to the Government in the amount stated.

This Court will observe that Exhibit 3 does not on its

face state the source of a single matter of fact therein set forth. Appellant was not told from what source this information was derived. No "books or records of account or minutes of proceedings of any department or agency of the United States" are mentioned except that the Comptroller has "examined and settled the claims of the United States against the person above named *****"

The only effort made by the Government to show in any way either the quantity or description of property of the Government which was lost or damaged, or the value of property destroyed or the injury to property only partly destroyed, consisted in its introduction, over objection by the defendant, of Plaintiff's Exhibit 3. (Tr. 73-76).

Appellant is not concerned with the authenticity of this document (which is admitted) but with its competency as evidence. The authentication merely makes the photostatic copy (Plaintiff's Ex. 3) admissible as the original, but it is appellant's position that the original was not admissible and hence the authenticated copy (Plaintiff's Ex. 3) is not admissible and there has been a total failure of proof of damage by competent evidence. Proper objection as to its competency was made. (Tr. 74, 75, 76).

The basic rules of evidence must still govern the competency of Government records, and a document which on its face does not claim to be anything more than simple uncorroborated hearsay (or conclusion) has always been held inadmissible to prove damages even under 28 U.S.C.A. 665 statutes. This proposition is so fundamental that only a few of the older Federal cases have even had to consider this proposition.

In 1829 the case of *U. S. v. Patterson*, *Fed. Case* 16,008 held that a certified and authenticated statement of the various charges and credits against a supervisor of revenue was incompetent to prove the damages against him.

“A full transcript from the books, containing the accounts, and also of the proceedings of the treasury in relation to them, in admitting or rejecting disputed vouchers, charges, etc., are indispensable to these objects; they can never be reached by the mere exhibition of the balance apparent upon an adjustment made, *ex parte*, by the officers of the treasury, and reported to the comptroller for his information of the amount claimed by the United States, and for which he is to bring suit; but which is the very matter complained of; the very adjustment appealed from, by the defendant. **** If a treasury certificate that such is the balance reported to be due is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretence; an useless form which might be dispensed with, and the judgment entered at once on the production of the certificate. This cannot be the intention of the law. The whole cause of controversy must be put into the possession of the court, as it exists in the treasury department; and thereupon the court and jury will pass their judgment.”

The evidence in that case was introduced under the first statute (Sec. 886 of the Revised Stat.) from which 28 *U.S.C.A.* 665 was derived. The case sets forth the statement in full and is very similar to the attempt made by the Government in the case at bar with Exhibit 3.

In *Hoyt v. U. S.*, 10 *How.* 109, 13 *L.E.*, 348, in a suit against a port collector, a transcript of books of the Treasury Dept. made up from quarterly reports of the accounting officers based on defendant's own reports were held adequate to guard him against surprise; but the court said a transcript of a gross balance would be objectionable.

In *U. S. v. Hilliard*, *Fed. Case*. 15,368 the syllabus notes are as follows:

“A treasury transcript to be evidenced must contain the original items of the accounts or balances admitted by the defendant in his official returns. The court can only revise the action of the Treasury by looking at the evidence by which the Treasury acted. A balance, therefore, struck by the Treasury cannot as such, be charged, and made evidence.”

In 1834 it was stated by the Supreme Court in *U. S. v. Jones*, 33 *U. S.* 375, 8 *Peters* 373:

“The officers of the treasury may well certify facts which come under their official notice, but they cannot certify that which does not come within their own knowledge.”

In *U. S. v. Morris*, 102 *U. S.* 548, 26 *L. E.* 226, the account of a delinquent person accountable for public money is not admissible unless certified to be a *transcript* from books and proceedings of the department.

In *Harvey v. U. S.*, 97 *F.* 452 (9th Cir.) this court held a transcript from the books of the department to be “a copy of the entire account as it stands on the books”; and quotes extensively from the cases above cited and from *U. S. v. Gaussen*, 19 *Wall* 198, 211 in explanation.

The foregoing cases all relate to actions for recovery of *public money*, not to actions for the value of government *property*. The value of money need not be proved. The value of property is, however, a matter of determination from various factors and unless admitted must be proven by evidence that can be tested by cross examination or otherwise.

In an action against an Indian agent of the government, the court said:

“It may be conceded that by virtue of §886 [28 U.S.C. 665] a transcript from the books of the Treasury, showing the officers receipts and disbursements of *public money* would be sufficient to warrant a judgment against him for any balance shown by such account to be due the government. But a transcript from a book which merely shows a charge in gross against an officer for the value of public property, without describing the property, *or the method of valuation or the manner in which it came into his hands, or the disposition made of the same*, is of no value even under §886.”

(*Italics ours*)

United States v. Smith

35 F. 490

In 1930 in *Mohawk Condensed Milk Co. v. U. S.*, 48 F. (2d) 682, it was held that the court would not accept certified copies as proof of correctness of figures and documents certified by a Government official receiving documents from some other official, department or commission. In that case it appeared that the Comptroller General's office obtained figures shown in notices from someone in the Federal Trade Commission, but there was no competent proof, as in the case at bar, as to who compiled the figures or how they were arrived at. However, in the Mohawk case, unlike the case at bar, evidence was offered for the purpose of showing how the Comptroller arrived at his figures, consisting of certain sheets of paper containing certain totals and summaries which the Comptroller General certified he had received from the Federal Trade Commission, without testimony in respect to the correctness of the figures or how they were arrived at by anyone who had anything to do with the preparation thereof. It was held that the documents certified by the Comptroller General were not competent proof of their contents or of the correctness of his determination.

“****There is no competent proof of this. This court

will not accept certified copies as proof of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department, or commission. Certification of documents proves only the document itself, and permits its introduction in evidence without further proof of identification, but such certification does not establish as a fact the correctness of the statements or figures therein contained. When there is as here a controversy concerning the correctness of the contents of such documents, such contents must be proved by the party relying thereon the same as other facts. We cannot accept the sheets certified by the Comptroller General as proof of their contents or of the correctness of his determination."

In somewhat analogous situations courts generally and this Court in particular, have been scrupulous to safeguard the rights of a defendant in an action brought by the Government based on detailed and extensive accounting which might be reflected in scores of books involving thousands of items. It is not unknown to have sold undetermined salvaged articles too cheaply. See *Greenbaum v. U. S.* 80 F. (2d) 113 at 121. We feel that this Court will properly exclude for lack of competency Exhibit 3 on the same basic principle that moved the United States Court of Appeals, First Circuit, in *Rugo Construction Co., Inc. v. New England Foundation Co., Inc.*, 172 F. (2d) 964 at 970, to hold that in a libel to recover value of a lighter which was sunk by respondent's alleged negligence, the Navy Department's Final Statement of Rented Construction Equipment was properly excluded for want of evidence as to who made the appraisal or how or on what basis it was made.

In 1947 the Second Circuit in the case of *Vanadium Corporation of America v. Fidelity Deposit Co. of Maryland*, 159 F. (2d) 105, had occasion to examine the statutes concerning the admissibility of Government records. In speaking of 28 U.S.C.A. 661, which has since been repealed, but which has been reenacted in substance in 28 U.S.C.A. 1733 (b), the court said at page 109:

“But the statutes merely provide for the method of proof of the records and do not settle their admissibility in a particular case, as proving or tending to prove the truth of the matters stated in them. Since, however, they are a substitute for the appearance of the public official himself, a natural limitation, so far as they deal with observed facts, is that they must concern matters to which he himself could have testified in person. As applied here, they should refer to matters such as admissions of the parties concerning the facts in issue or official action taken and the grounds therefor. These are facts as to which the officer himself could have been subpoenaed to testify ***”

CONCLUSION

The District Court should have granted appellant's motion for dismissal of the complaint either on the ground that the contract was for a warehouseman's legal liability and not for an insurer's liability or in any event because there was a total failure of proof by any competent evidence as to any damages sustained by the Government.

Respectfully submitted,

WITHERSPOON, WITHERSPOON AND KELLEY,

WILLIAM V. KELLEY,

Attorneys for Appellant.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION
COMPANY, A Corporation,
vs.
UNITED STATES OF AMERICA,
Appellant,
Appellee. } No. 12422

*On Appeal from the District Court of the United States
for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

HARVEY ERICKSON
United States Attorney

FRANK R. FREEMAN
Assistant United States Attorney

FILED

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY, A Corporation, <i>Appellant,</i>	} No. 12422
vs.	
UNITED STATES OF AMERICA, <i>Appellee.</i>	

*On Appeal from the District Court of the United States
for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

ADDITIONAL STATEMENT OF THE CASE

Inasmuch as the appellant's statement of the case is very brief, it may be helpful to the Court to have a short additional statement made as to the important facts. The contract, which is set out in its entirety in the statement (Tr. 8-28), provides for the warehousing by the appellant's warehouse company of certain Naval

stores. Three months after the merchandise was stored in the appellant's warehouse a fire occurred which caused considerable damage to the Naval stores in the warehouse. The fire was caused without any fault on the part of the appellant. The contract provided as follows:

“Special Provisions: A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.”

It was admitted during the trial that the State of Washington had no mandatory insurance provision in its warehousing laws. As different parcels or loads of merchandise were delivered by the Navy to appellant's warehouse, the appellant would issue its ordinary receipt to the Navy personnel who delivered the merchandise to the warehouse. The receipts were printed by the appellant and used for all merchandise that was received and receipted for. The receipt contained the following provisions:

“The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control.” (Appellant's brief, page 5).

After the fire occurred in the warehouse, J. M. Lomax, the President of the appellant corporation, was notified that the Navy claimed certain losses due to the fire and made a demand upon the appellant requesting

that he pay the Navy the amount of loss that it suffered. The first demand letter was received by the appellant in February, 1945, more than two months after the fire (Tr. 85). The first demand was for \$12,359.13. Later other demands were made culminating in a demand on December 13, 1946, for the sum of \$16,415.87. The reason for the increase in the amount due was that certain of the salvaged cloth had to be shipped to New York and a sale made before the final loss became determined. Later, the claim was referred to the General Accounting Office and a demand made upon the appellant to pay the same (Tr. 91).

Soon after the occurrence of the fire a Naval Board of Inquiry was assembled and inquiry was made as to the nature of the fire. The appellant attended this Board of Inquiry and gave testimony (Tr. 91). Effort was made by the officers of the Navy to realize everything possible from the reclamation of the burned material. The appellant, upon demand, refused to make any payment and made no effort toward securing administrative relief from the Navy by asking for reformation of the contract and by appealing to the contracting officers or to the Secretary of the Navy and appellant took no steps under the Disputes Article of the contract, Article 17, which provides as follows:

“Disputes— Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the Contractor within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the mean-

time the Contractor shall diligently proceed with performance." (Tr. 26, 27).

The complaint was filed in the case on November 14, 1947, nearly three years after the loss, and judgment in the case was entered on September 6, 1949, almost two years later. The appellant was served with a Request for Admission under Rule 36 on April 9, 1948, as to an itemized detailed statement of the amounts of material damaged and the appraised value of the total damage to the Navy (Tr. 38-40). On May 4, 1949, thirteen months later, the appellant in answer to the Request stated that the copy of the Certificate of Settlement was a true and correct copy of the Certificate of Settlement and the appellant could not truthfully admit or deny various items of damage and the total amount of the damages set forth in said portions of the Certificate of Settlement for the reason that Naval personnel were in exclusive charge of the salvage operations and would not permit the defendant or any of its agents to be present during said salvage operations, and therefore the defendant had no knowledge or belief as to the amount of said damages if any (Tr. 48, 49).

The appellant on March 31, 1949 was served with interrogatories purporting to ascertain if appellant up to that time had pursued any administrative relief provided by contract or relief seeking a revision, modification or reformation of the contract and asking for the name of any agents of the Naval Department who might have made statements of non-liability on behalf of the Government to the appellant (Tr. 42-44). On April 30, 1949 appellant answered the interrogatories

stating that it had sought no administrative relief and did not remember which Naval Officer promised them that the contract was not one for insurance (Tr. 47-48). The matter proceeded to trial. The Government introduced no testimony but merely offered in evidence the exhibits which had previously been certified in pre-trial conference and requested by admission. The exhibits offered were the contract between the Navy and the Lomax Transportation Company and the Certificate of Settlement from the General Accounting Office. (Tr. 71, 72). Exhibit 3, a certified copy of the settlement of the account with the General Accounting Office, was also received in evidence. The Government rested its case. Testimony was then advanced on behalf of the defendant to the effect that he was engaged in the warehouse business in the City of Spokane; that the contract bore his signature; that the fire did occur on December 26, 1944; that he had no insurance upon the Government property in his warehouse; that he did not think that he was required to have insurance on the property; that he thought he was only legally obligated to provide for insurance against his own negligence (Tr. 79-82).

Lomax further stated that he did not do the typing on the contract; that he did not read the contract before he signed it (Tr. 92).

The contract in question was signed on behalf of the United States by J. Ball, Capt. U.S.N., Supply Officer in Command, and J. M. Lomax, President of the appellant corporation, whose signature was witnessed by W. W. Witherspoon, Secretary of the corporation and a long time member of the bar of the State of Washington and a member of the bar of this Court.

ANSWER TO APPELLANT'S ASSIGNMENTS
OF ERROR 1-3 INCL.

I.

The appellant discusses the following three assignments of error together and appellee will likewise discuss them together:

1. The District Court erred in denying defendant's motion to dismiss plaintiff's complaint, which order was signed and filed December 9, 1947.

2. The District Court erred in granting plaintiff's motion to strike in part paragraph III of defendant's amended answer, which order was signed and filed April 7, 1949.

3. The District Court erred in refusing to admit in evidence the findings of fact of the Naval Board of Inquiry to the effect that recovery from the contractor under his insurance would be limited to his legal liability under the existing Washington Warehouse Laws, and that there was no apparent negligence on the part of the defendant. (Plaintiff's Ex. 1, Tr. 96).

The appellant and the officers of the Government executed a contract of insurance. It is admitted that a common law bailee for hire, such as the appellant warehouse company in this case, would not have to exercise any more than ordinary care or at the most a high degree of care, being a compensated bailee, but in this case the parties made a special contract of bailment which provided that the Contractor assume absolute responsibility for property in his possession and shall maintain bond and insurance at his own expense in

accordance with the State of Washington Warehousing Laws.

It is admitted that the State of Washington has no warehousing laws compelling a warehouseman to take out insurance of this kind on merchandise stored in his warehouse, but the State of Washington has no law prohibiting a warehouseman from contracting to assume absolute liability and provide the bond and insurance at his own expense, and that is what the appellant in this case contracted to do so that the District Court was correct in construing this to be a contract of insurance in addition to being a contract of warehousing because that is exactly what the contracting parties provided by their own instrument.

Whether or not this contract was dictated by one C. T. McCormack, Jr. or not is immaterial. The important consideration is that it was executed according to Naval regulations and signed by a proper contracting officer and officers of appellant. Even if McCormack were produced as a witness, his testimony would be inadmissible to alter, vary or explain away the provisions of a written contract which is itself definite and certain.

The appellant also makes an argument (Tr. 12) that bonded warehouse receipts were used by the appellant and upon those receipts language was contained which exempted the appellant for fire loss. It would not make any difference what language the appellant used upon its official receipts for merchandise because those receipts were not a contract with the Government, and the mere fact that some Naval officer or employee of

the Navy accepted a receipt with the kind of language contained therein would certainly not be binding or controlling upon the Government as the only way that the Government could be bound is by a contract properly executed and not by a unilateral agreement written on a receipt in fine language given to a Naval employee by the appellant in exchange for merchandise.

Appellant's argument that this contract entails hardship on itself should not be considered at this time and it is no concern of the Court whether or not the contract later proved to be improvident. Lomax, President of appellant corporation, was a warehouseman and owned three warehouses in the City of Spokane. He certified that he read the contract (Tr. 28). In addition his signature was witnessed by two witnesses, Helen Ferguson and B. C. Redhead, and attested to by the corporation Secretary, W. W. Witherspoon, a long time member of the bar of this Court. Certainly the courts cannot rewrite a contract on account of hardship because what was apparently a good contract when made turned out to be a disadvantageous contract due to unforeseen circumstances.

The appellant also argues that the contract was drawn by the Government and should therefore be construed most strongly against the party drawing it. Certainly the Government agent C. T. McCormack, who, as appellant now contends, drew the contract, had no more business or legal experience than the agents of the appellant whose names appear upon the contract.

No cases are cited, nor is it believed that any cases can be cited, showing that contracts involving the United States should be construed against the United States

because they were drawn or dictated by an officer of the United States. Certainly there is not even anything ambiguous about the provision of paragraph 4 A.

The contractual provision is one of insurance. The appellant next contends that the existing Naval regulation at the time found in the Bureau of Supplies and Accounts Manual provides as follows:

“The Navy Department has adopted the general policy of self-insurance under which it assumes the risk of loss or damage to government owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have been inserted in the government furnished material clause and the advance and partial payment clauses. Field purchasing officers will not include any other insurance provisions in contracts without the approval of the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section).”

The quoted regulation is part of a regulation having to do with construction contracts and deals with building construction contractors. No particular regulation has been discovered having to do with the storage and warehousing of Naval property. The regulation provides, insofar as construction contracts are concerned, the Navy Department has adopted a general policy of self-insurance under which it assumes the risk on Government-owned property. Even if this proviso applied to storage contracts the Government could still take full advantage of the contract provisions although the Naval officer, in executing the contract, has gone beyond his authority and driven a deal for the Government which is more advantageous to it and which is

more burdensome upon the contractor than the regulation would require.

The case illustrative of this is *Gilbert & Secor v. United States*, 75 U. S. 358. In this case the contracting officer required the use of copper sheathing which went beyond the authority of the Act of Congress which authorized felt sheathing. The contractors then proceeded to bring suit in the Court of Claims. The Court held that Congress intended to authorize the Secretary of the Navy to make the best contract he could, not exceeding the limit. It also appeared from the agreement signed, and therefore accepted by the claimants, that the Secretary was induced to exercise the option which the Act gave in regard to the two kinds of work, in favor of that of claimants, in consideration that they would copper-fasten the dock without additional charge, although the regulations merely provided for the use of felt. The contractors, having thus induced the Secretary to decide in their favor, by awarding them the contract, are not at liberty to repudiate that part of the contract in regard to price. The Court held that there was no reason to infer any contract prior to the written agreement governing the rights of the parties.

The case of *The International Contracting Company v. Lamont*, 155 U.S. 303, was an action by mandamus to set aside the written contract to do excavation work for 13.7 cents per cubic yard and have a contract signed with the Secretary of War to do the work for 19.7 cents per cubic yard. The Court held that the second contract was entered into by the contractor's own accord and he has taken advantages which resulted from his action under it and has received the compensation which was

to have been paid under its terms. In having done all this the contractor is estopped from denying the validity of the contract. The Court further held that the fact that in the second contract the contractor protested that he had rights under the first did not better his position. If he had rights he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work.

The Court further held that a party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences and that, if the claimants had any objection to the provisions of the contract they signed, they should have refused to make it and, having made it and executed it, their mouths are closed against any denial; that it superseded all previous arrangements. To this effect are two other cases, *Steele v. United States*, 113 U.S. 128 and *District of Columbia v. Barnes*, 197 U.S. 146. The officers of the United States Navy were bound to obtain the best contract that they could. Appellant may not have gotten the contract if it did not agree to the insertion of this insurance clause, paragraph 4 A. The appellant had a perfect right to refuse to execute this contract with this clause in it, which it says is now so obnoxious. Certainly this provision was written into the contract by both parties as the result of open bargaining and there was no prohibition against such a provision in the contract.

Counsel for appellant further makes the statement that the conduct and declaration of the parties may always be evidence of the subsequent modification of

their contract (Br. 17). The appellant has not set forth any modification other than the fact that certain receipts were issued bearing the printed provisions that the warehouseman would not be liable for fire. If he intended to proceed upon that theory that the contract should be modified or rewritten, the appellant had ample opportunity to proceed to secure a modification or revision which will be later referred to.

ANSWER TO APPELLANT'S ASSIGNMENTS
OF ERROR 4-7, INCL.

II.

The appellant then makes the following assignments of error and discusses them together — we shall discuss them collectively:

4. The District Court erred in admitting and considering in evidence over defendant's objection the Certificate of Settlement of the General Accounting Office (Plaintiff's Ex. 3) for the purpose of providing that the Government sustained damages and the amount thereof. (Tr. 73-76)

5. The District Court erred in denying defendant's motion for a non-suit and for a dismissal of the complaint on the ground of a total failure of proof as to any damages sustained by plaintiff. (Tr. 76)

6. The District Court erred in rendering and entering the final judgment in the sum of \$16,415.87. (Tr. 52, 53)

7. The District Court erred in denying defendant's alternative motion for judgment notwithstanding the decision and for a new trial. (Tr. 55, 56)

At the trial there was introduced in evidence as Exhibits 2 and 3 the Certificate of the General Accounting Office which was a certified copy of the appellant's accounts on the books of the General Accounting Office. The appellant did not object to the Certificate on the grounds of authenticity, but objected solely upon the ground that it was incompetent to prove the amount of damages suffered as a result of the fire (Tr. 74). It

should be considered by the Court at this time that although demand was first made upon the appellant on February 2, 1945, no administrative relief was sought by the appellant down to the time of the entry of judgment in September, 1949, more than four and one-half years later. Article 17 of the contract provides as follows (Tr. 26, 27) :

“Disputes— Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the Contractor within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with performance.”

In addition to the disputes article in the contract, relief from mistake in Naval contracts is provided by the following other methods:

1. Naval Regulation 1071 provides that contracts may be amended or modified by contracting officers (Tr. 104-106), also the following naval regulations: Title 34, C.F.R., 1947 Supp., Sec. 1.11, paragraph B(1) and F(1). (These regulations create the Bureau of Supplies and Accounts by the Secretary of the Navy). “Services” are defined as including warehousing, Title 34, C.F.R., 1947 Supp., Sec. 31.121-11. Mistakes in bids can be corrected by the contracting officer, Title 34, C.F.R., 1947 Supp., Sec. 31.244. Disputes are dealt with in Title 34, C.F.R., 1947 Supp., Sec. 31.324 to 31.328, and these regulations provide that they should be determined by contracting officers. Title 34, C.F.R. 1947

Supp., Sec. 32.2 and 32.3 provides that the Navy should dispose of surplus property at the best prices obtainable.

2. Title 5, U.S.C.A. Supp., Sec. 1009c, the Administrative Procedure Act, provides that administrative remedies must be pursued to a finality before the courts will take cognizance of the dispute.

3. Title 41, U.S.C.A. Supp., Sec. 113 and 117 gives the contractor certain administrative remedies as to a war contract if the contract is defective or deficient, as claimed, and the contractor has the right to appeal to the Appeal Board, which decision shall be final.

The appellant, although it had several years to do so, made no resort of any nature either under Article 17, the Disputes article of the contract, under the Administrative Procedure Act, under the Naval Regulations, or under the statutes dealing with defective contracts, by appealing to the contracting officer, and through administrative channels for a redress of grievances. During all times that the case was pending the appellant did absolutely nothing except hold some oral conversations with some Naval personnel, the names of which he does not now remember, as to what his rights and obligations were under the contract. The Disputes provision of the contract and the Naval regulations gave the appellant ample protection, if he would have availed himself of the opportunity. Instead of doing this he did absolutely nothing except wait and see what would happen. The appellant admits that he was at the Board of Inquiry hearing when the matter of the

amount of loss was being determined. The time for the appellant to have been heard upon the dispute as to the value of the salvage and the loss occasioned by the fire was the hearing before the Naval Board of Inquiry held at the time of the fire or even after receiving the award. If the appellant was dissatisfied, he had the right and privilege of appealing to the contracting officer as provided by the regulations and, if dissatisfied with the contracting officer's decision, he had the right to appeal to the Secretary of the Navy ultimately to determine this question.

The appellant assigns as error the admission of the General Accounting Office "Certificate of Settlement" under date of November 12, 1946, which stated in part that the appellant Warehouse Company was indebted to the United States in the sum of \$16,415.87 and that no individual, agent or employee of the General Accounting Office was produced to testify as to the correctness of such statement and that no one having to do with the salvage of the Naval stores and the preparation of the certificate was called, nor were books or records of the Navy Department submitted in evidence. Immediately after the fire there was a Naval Board of Inquiry hearing at the warehouse, at which, among those present at the Board, was J. M. Lomax, President of the appellant corporation.

Title 28, Section 1732, U.S.C.A., is a statement of the Shop Book Rule of Evidence, by which statute any written record made as a memorandum of record of any account or transaction shall be admissible as evidence of such act or transaction if made in the regular

course of business. The statute further provides that all other attendant circumstances, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. Title 28, Section 1733, U.S.C.A., provides as follows:

“(a) Books or records of accounts or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

“(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.”

The records in the office of the General Accounting Office were certainly made in the regular course of business having to do with an account of the United States against a contractor for warehousing Government material and supplies. The appellant had every means and opportunity of arguing to the Court and showing to the Court the lack of personal knowledge of the entrant or maker, if he so desired, and had ample means at his disposal during the several years that this case was pending trial of taking depositions availing himself of the discovery procedure to arrive at the correctness of this memorandum. Certainly the copy received in evidence was a properly authenticated copy of the record and as such would be admissible as a copy of the record of a department or agency of the United States, so that both these statutes together,

Sections 1732 and 1733 of Title 28 U.S.C.A., made this document admissible in evidence.

The Supreme Court of the United States has passed on the admissibility of evidence of this type in a number of cases. In the case of *United States v. Gaussen*, 86 U.S. 198, the Court states at the bottom of page 212:

“While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books.”

In the case of *Soule v. United States*, 100 U.S. 8, another case interpreting the same statute, the Court stated as follows (page 11):

“Treasury settlements of the kind are only prima facie evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account.”

The case of *United States v. Bell*, 111 U.S. 477, was a suit upon the bond of a purser of the Navy and at

the trial a transcript from the books and proceedings of the Treasury Department, duly authenticated, was offered in evidence.

In the case of *Moses v. United States*, 166 U.S. 571, the defendants, in an action for a balance due the War Department, took exception to the decision of the trial court in permitting the plaintiff to introduce certain transcripts of the books and proceedings of the Treasury Department for the purpose of proving the actual state of the accounts between the government and one Howgate. The transcripts were objected to on two grounds: (1) that they showed on their face that they were mere statements of balances and not the entire account between the parties; (2) that they showed that the government officers had made a restatement of Howgate's account after he ceased to be property and disbursing officer, and that there was no authority for making such restatement, and that it was not evidence against the defendants. The certified statement in the case stated that there was a balance due the United States of \$133.255.22 and the certificate did not purport to certify to a copy of the whole account between the government and Howgate. The Court held that all the records in the case were admissible and constituted a full statement of the amounts and balances due.

The case of *United States v. Pierson*, 145 Fed. 814, was an action brought on the bond of a United States Indian Agent in which a transcript of the books and proceedings of the Treasury Department, duly certified and authenticated as required, were offered in evidence. The Court stated at page 817:

“The transcript itself was sufficient proof, in the absence of countervailing evidence, to entitle the government to a verdict upon many of the items in controversy.

“The effect of transcripts from the books and proceedings of the Treasury Department, certified in accordance with the act of Congress, as evidence in actions against officers accountable for public moneys and their sureties has been recognized many times. Such a transcript is not, as counsel for the defendants seems to contend, proof of such a low order that it may be disregarded by the court. A transcript, when in proper form, properly certified, and admitted in evidence, makes a *prima facie* case for the government, and, although the statute says ‘that the court trying the cause shall be authorized to grant judgment and award execution accordingly,’ it is not meant that whether the court shall do so or not is left in any degree to its discretion. If the *prima facie* case made by the transcript is not overthrown, it is error to refuse to grant judgment. The case is then like any other in which a plaintiff has made a *prima facie* showing.”

Of like effect is the case of the *United States v. DuPerow*, 208 Fed. 895.

In the case of *Vanadium Corporation v. Fidelity and Deposit Company*, 159 F. (2d) 105, cited by the appellant, the Court admitted certain documents produced from the files of the Interior Department, which plaintiff contended were hearsay evidence and should not be admissible. The Appellate Court held that the Trial Court properly admitted the documents as official entries and documents and were within the exception of the hearsay rule.

The case of *Mohawk Condensed Milk Co. v. United States*, 48 F. (2d) 682, cited by appellant, was a suit for overpayment of income and profits taxes and a setoff was attempted to be made for certain amounts of canned milk sold to the government and charged for at excess prices. In this case there was merely an examination of plaintiff's books by a representative of the Federal Trade Commission and a certification thereof made. In this particular case there was a full Naval Board of Inquiry hearing at which the appellant was present.

Also in the case of *Rugo Construction Co., Inc. v. New England Foundation Co.*, 172 F. (2d) 964, cited by appellants, the Navy Department's final settlement in the sum of \$25,000.00 was excluded and it was pointed out that there was no evidence as to who made the appraisal or on which basis it was made, and it was merely an appraisement value of a certain amount upon the boat, which was a matter of opinion. The Court stated that it was without probative value, since there is nothing to indicate that it was made without motive to inflate, by a competent expert, after the appraisal.

In the *Rugo* case and the *Mohawk* case the appraiser could have been called as a witness and subjected to cross examination, which could not be done with a Naval Board of Inquiry.

The case of *United States v. Smith*, 35 Fed. 490, cited by appellant, was a case on a bond given by the defendant to secure his faithful performance as Indian Agent. In that case the Court held that, as to public moneys, a transcript from the Treasury Department was admissible against the appellant as evidence of the amount of the shortage, but a transcript from a book which

merely shows a shortage in gross for the value of public property, without describing the property or the method of valuation or the manner in which it came to his hands or the disposition made, is of no value as to that cause of action.

The situation in this case is entirely different because of the request for admissions under Rule 36 served upon the defendant, itemizing the items of damage and the total damages to the Navy by items and the answer to the request for admission thirteen months later (Tr. 48, 49) in which the appellant states that he cannot truthfully admit or deny the various items of damage, since the naval personnel were in exclusive charge of all salvage operations and did not permit defendant or any of its agents to be present during such salvage operations. This answer is in conflict with the defendant's own testimony that he did attend the Naval Board of Inquiry meeting after the fire and gave testimony (Tr. 91).

It should be remembered in this case that after the occurrence of a fire the salvage operations must be pursued by the Navy before the amount of loss could be ascertained. Those operations would necessitate some length of time, in that the partially damaged material would have to be reprocessed, packaged, and shipped in many cases before it could be sold. No witness was available to the Government who had independent knowledge and recollection of these proceedings occurring during time of hostilities when the case was tried more than four and one-half years after the occurrence of the fire. The Naval Regulations, Title 34 C.F.R., 1947 Supp., Sec. 27.19, Page 5436, creating

the War Contracts Relief Board, give the contractor ample opportunity in an informal way to state his position in any controversy that may arise and secure an adjudication of his claims. Certainly the appellant was afforded due process of law by the statutes and regulations pertaining to this controversy, if he decided to use them.

CONCLUSION

The rights of the appellant were amply protected, because within two months after the occurrence of the fire in December 1944, according to his own statement he admits that he knew the Navy was making a claim against him. Although he says that he did not read the contract at the time he signed it, he knew two months after the occurrence of the fire that the Navy was claiming he owed money on account of the fire damage. The amount of the fire damage, if any, was certainly a dispute under Article 17 of the contract entitling the appellant to seek redress by the contracting officer, and, if dissatisfied, to the Secretary of the Navy or his duly authorized representative. As has been pointed out, the Administrative Procedures Act, Title 5, Section 1009, U.S.C.A., the Public Contracts Act, Title 41, U.S.C.A., Sections 113 and 117, and the Naval regulations in force and effect at the time also provided that the administrative remedy be pursued by the appellant.

The ^{case of} ~~Supreme Court of the United States in~~ *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, was a similar case in which a contractor failed to exhaust the administrative remedy. The contract contained the

same provision as the contract contained in this case. In that case the court said that failure to pursue the administrative remedy was fatal and the contractor could not proceed in the Court of Claims.

Also the case of *United States v. Blair et al*, 321 U.S. 730, was a similar case involving failure on the part of the contractor to pursue the administrative remedy. The Court in that case said (p. 736) :

“If the conduct of the government superintendents or contracting officers, or their assistants, was so unflagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts.”

The judgment of the Court of Claims was therefore reversed.

Also to the same effect is *Gerhardt F. Meyne Company v. United States*, 76 Fed. Supp. 811. Also the case of *United States v. Kelly*, 69 Fed. Supp., 89, at p. 93.

In this case, the government at an early date—February, 1945—disclosed its position, but the appellant did nothing with regard to the proceedings undertaken by the government, both during the stages that this claim was in its administrative phases and during the later action in Court. Since the defendant's own contract and the above-cited regulations provided that if he considered there was a factual dispute he should have addressed himself to the proper office of the Navy to determine that dispute and he failed to do so, he cannot now ask the Court to grant him relief for failure to take

steps which he contracted to take and which the regulations provided that he take.

HARVEY ERICKSON

United States Attorney

FRANK R. FREEMAN

Assistant United States Attorney

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee

Reply Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington
Northern Division*

WITHERSPOON, WITHERSPOON AND KELLEY,
WILLIAM V. KELLEY,
1114 Old National Bank Building,
Attorneys for Appellant

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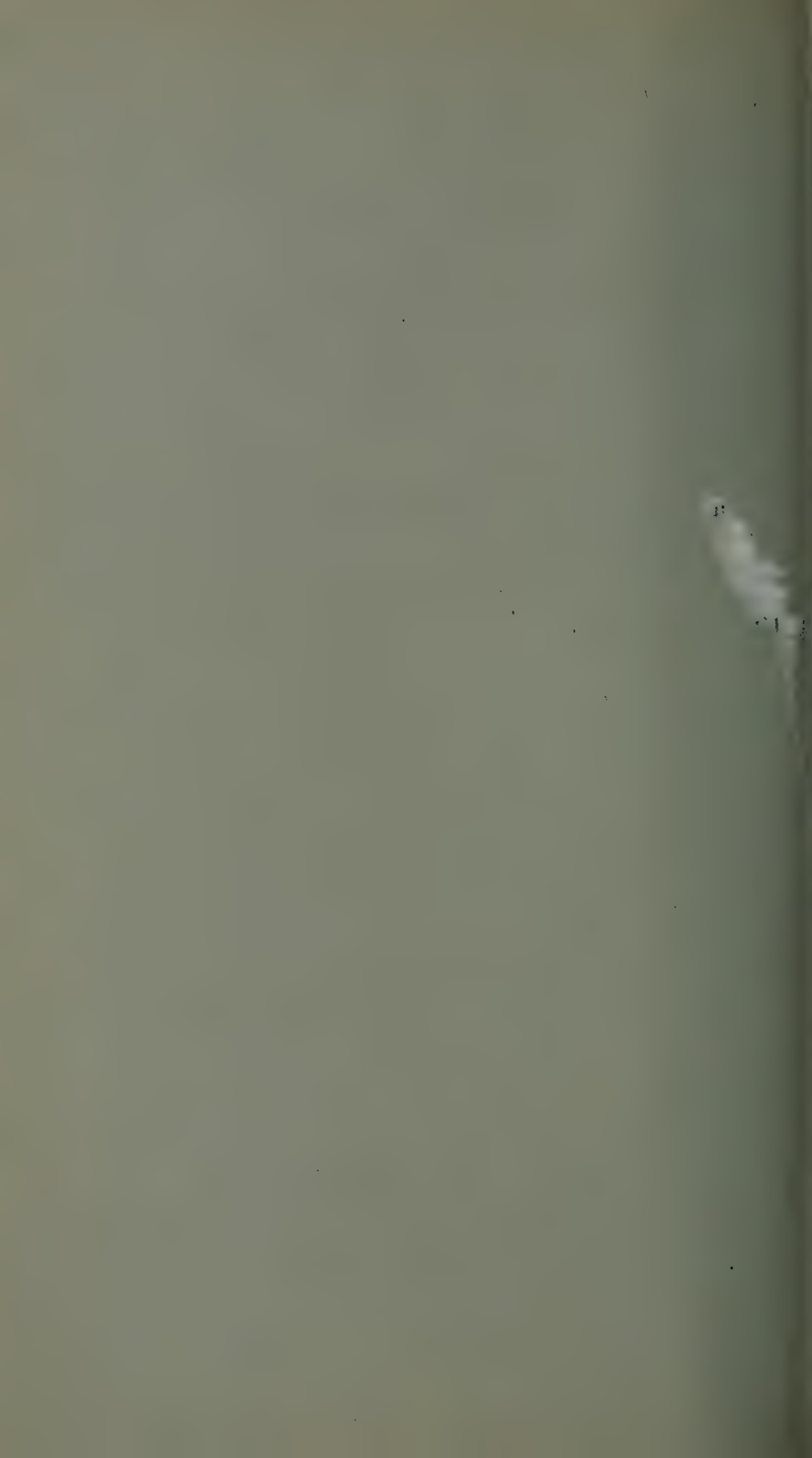
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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee

Reply Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington
Northern Division*

WITHERSPOON, WITHERSPOON AND KELLEY,
WILLIAM V. KELLEY,
1114 Old National Bank Building,
Attorneys for Appellant

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It may be helpful to this Court for appellant to reply to the Government's brief seriatim.

I

On page 3 of its purported "Additional Statement of the Case" several points of argument are made that have no support in the record. In the first place, the statement is made, "Effort was made by the officers of the Navy to realize everything possible from the reclamation of the burned material." That is an assumption the appellant cannot concede, an assertion that is hardly consistent with the later sentence on page 5 of the Government's brief that, "The Government introduced no testimony ****," and a statement which has no evidence to support it. In the second place, by juxtaposition the rest of the paragraph on page 3 of appellee's brief would seem to infer that not only salvage "effort was made by the officers of the Navy" during the Naval Board inquiry, but that a demand was then and there made upon appellant for payment and that then there were "disputes concerning question of fact under this contract." The appellee by this use of language seems to confuse the Navy Board of Inquiry with the salvage operation later conducted by the Navy. The Naval Board of Inquiry was convened December 27, 1944, a few days after the fire and was concerned with liability or the cause of the fire, not the nature and extent of the damage. (Tr. 61).

There was absolutely nothing in its findings for the appellant to appeal from as appellee now seems to suggest on page 3 of its brief that appellant should have done. The Navy found that there was no negligence. Indeed, the findings of fact of the Naval Board of Inquiry specifically held

that recovery from the contractor under his insurance would be limited to his legal liability (which would depend upon negligence) under the existing Washington warehouse laws, and that there was no apparent negligence on the part of the defendant. Appellant has assigned as error (Assignments of Error 4 to 7 inclusive) the District Court's refusal to admit these findings as evidence on the theory they were of some probative value in showing how the Navy had interpreted its own contract and what its own conduct was with respect to it.

However, the salvage operations took place after this Naval Board of Inquiry was held and separate and apart from it. Indeed, it was not until February 2, 1945, more than two months after the fire, that any demand at all was made. (Ex. 5, Tr. 85). Until then appellant had no reason to believe that it had any practical concern with the nature and extent of damage.

Going directly to appellee's argument, on page 6 of its brief, for the first time the contract is designated by the Government to be "a contract of insurance," that is, one in which liability for performance will arise irrespective of negligence. However, this construction, ignores the fact that the printed contract itself specifically did not make the Warehouse Company an insurer. The contract itself in Article 10 thereof provided in part, as we have pointed out, that the contractor (Warehouse Company) will not be liable "for failure or delay in delivery or performance when such failure or delay is due to causes beyond the control or without the fault or negligence of contractor ****." (Art. 10,

Tr. 17, 18). Appellee has not and cannot answer this provision of its own contract.

On page 7 of its brief, the Government states that the "contract was executed according to Naval regulations" but ignores the admitted fact that one C. T. McCormack Jr., or someone else, typed in provision 4. A. which, if given the construction urged by the Government, would violate a specific provision of the Naval regulations that, "Field purchasing officers will not include *any other insurance provisions* in contracts without the approval of the Bureau of Supplies & Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section)." (Italics ours).

At the bottom of page 8 of its brief appellee complains that no cases were cited by appellant to the effect that the contract, including typewritten 4. A., should be construed mostly strongly against the Government, which drew it. It is certainly hornbook law that language will be interpreted most strongly against the party using it. 3 *Williston on Contracts* §621 (Revised Edition), which was cited by appellant), in its footnotes collates scores of cases on the point. Surely appellee does not contend that a different rule should prevail because the Government was involved. It has been aptly said:

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."****" *Carstens Packing Co. v. United States*, 62F. Supp. 525, quoting with approval *United States v. Bostwick*, 94 U. S. 53, 24 *Law Edition* 65, 66.

We are not sure that we follow appellee's argument on page 9 of its brief, but apparently it is that the Navy had only adopted a policy of self-insurance for the purpose of keeping down its contractual cost in connection with *construction* contracts and that even though a construction contract form was used here, the regulation should not apply to a contract for *storage and warehousing*.

It is true that this printed form of contract itself was usually used for the procurement of supplies and that 95% of the terms therein are not even remotely applicable to the present contract situation for storage space. Nevertheless, the Government sought to adapt it to the leasing of warehouse space, and it was a Naval scrivener apparently without any legal training who typed in the Special Provision 4. A. The quoted regulation (Vol. 1, Bureau of Supplies and Accounts Manual, Art. 1061 3 (g) outlines the general policy of the Navy to be its own insurer and there is nothing in the regulation limiting that policy to manufacturing or construction contracts as the Government would now like to limit it.

Appellant Warehouse Company had executed other Government contracts for storage and none of these had ever contained such a provision as clause 4. A. (Tr. 92, 93). Appellant was simply never informed of this construction of clause 4. A. at the time it signed the contract. The W. W. Witherspoon whose name appears on the contract merely attested as Secretary of the Company that a J. M. Lomax signed it as President. Lomax testified in substance that if the claim of an insurers liability now asserted for clause 4. A. had been called to his attention, he would never have

signed it, as he was fully aware of his warehouseman's common law liability (Tr. 93). Certainly it is plain that the Government had given him no intimation that he was expected to go into the insurance business. Certainly appellant would not have undertaken this risk at the contract rate. There is no evidence that it could have covered itself by insurance at all, and if it could, it must be assumed that it would have been at prohibitive rates which in turn it could have been expected to include in the contract rate charged the Government. Indeed, the Government recognized this and the Navy had simply adopted a policy of self-insurance for the purpose of keeping down its contractual costs. (See Naval Regulations, Volume 1, Bureau of Supplies and Accounts Manual, Article 1061 3. (g). Even if Lomax, a layman, had read provision 4. A., it would have simply corroborated his understanding that he was to be held to his usual warehouseman's liability.

The remainder of appellee's argument on pages 9 to 12, inclusive, seems to be that the Government agent could impose an insurer's liability without authority and that the Government, in contradistinction to what a private litigant could do, might take advantage of an unconscionable term in a contract which was inserted by a Government agent without authority and through the mistake or inadvertence of both parties to the contract. The fallacy of this argument is apparent. Appellant is asserting that this proviso 4. A. in the contract did not impose an insurer's liability because such was not intended by the parties. There was no evidence by the Government on the point at all, but the Warehouse Company offered such evidence. Finally, an examination

of the cases cited does not support the Government's contention that the Government could still "take advantage" of such a result beyond the authority of the Naval Contracting officer.

In support of this contention, the Government cites an 1868 case, *Gilbert & Secor v. United States*, 75 U. S. 358. Apparently reliance was placed upon a misleading headnote of this case which was an action by contractors to recover additional cost of copper sheathing on a drydock called for by contract. The court of claims expressly held that the Secretary of Navy had authority to make the contract and properly concluded that the plaintiff below was bound by its terms. In that case no contention was ever made by the contractor that there was any mistake in reference to their being bound by the terms of the contract to copper sheath the dock.

Again, the case of *International Contracting Company v. Lamont*, 155 U. S. 303, decided in 1894, is not in point. Mandamus action was brought to compel the Secretary of Navy to sign a contract based upon a first bid submitted. The second proposal for bids had been opened and plaintiff's bid accepted, his second bid being much lower than his first. It was rightfully held that mandamus would lie only to compel a ministerial act as distinguished from discretionary one; further, that the first bid was not submitted on the terms of the first offer so the Secretary of Navy was justified in refusing to act; also at the time the action was commenced the plaintiff had already signed the second contract and since mandamus lies only to compel the performance of duty existing at the time of the commencement of an action,

it would not lie because by signing the second contract the plaintiff voluntarily submitted himself to the terms of the second contract.

It must be kept in mind that here the appellant is not seeking to bind the Government by the unauthorized act of its agent, but is simply trying to relieve the Warehouse Company from an insurer's liability imposed by such an unauthorized act. Yet the Government cites *Steele v. United States*, 113 U. S. 128, on page 11 of its brief. This Steele case simply held that the Government was not estopped from claiming the full value of scrap delivered to a Navy contractor by the unauthorized act of a Naval officer who settled the account for much less than scrap was worth. Appellant cannot discern the applicability of this case or that of *District of Columbia v. Barnes*, 197 U. S. 146, also cited on page 11. This last case simply held that the court of claims had equitable jurisdiction to reform a contract upon certain facts. In short, none of the authorities cited have the remotest connection with the case at bar.

The gratuitous remarks on page 11 of the Government's brief that the appellant "may not have gotten the contract if it did not agree to the insertion of this insurance clause, *****" and that "this provision was written into the contract by both parties as the result of open bargaining *****" has no support in the record.

II

On pp. 17-28 of appellant's opening brief were discussed its assignments of error 4-7 as based upon the admission of Exhibit 3, and the Government's failure to prove damage

under the common rules of evidence, and particularly under the "shop-book" rule as embodied in 28 *U.S.C.A. Sec. 1732*, and the statutory rule admitting certain records of transactions and occurrences, contained in 28 *U.S.C.A. Sec. 1733*.

Appellee's answer to these assignments discusses said statutes (Br. pp. 16-24); and also makes a contention (Br. pp. 13-16) that appellant was bound to seek some sort of administrative relief, and that for failure to do so it cannot object to such evidence.

Appellee relies first on Article 17 of the contract as requiring that all disputes on questions of fact shall be decided by the contracting officer, subject to appeal by the contractor to the Secretary of the Navy.

We cannot see that Article 17 has any relation to the admissibility of Exhibit 3. Appellee states (p. 16) that the time for appellant to have been heard upon the dispute as to the value of the salvage and the loss caused by the fire was at the hearing before the Naval Board of Inquiry, or even after receiving the award. That Board did not pass upon the amount either of the salvage or of the loss. The investigation and finding of the Board related to the cause of the fire, and they found it was not due to appellant's negligence and that appellant was not liable for any loss other than whatever liability was imposed on it as a warehouseman under the State laws. That finding was favorable to appellant and it had no cause to appeal from it, even if any appeal were possible. But Article 17 of the contract provided no such appeal in any event. The only appeal contemplated or mentioned was *from* the contracting officer, not *to* him. Article 17 provided that questions of fact

under the contract should be decided by the contracting officer; it did not authorize appellant to appeal to such officer from a decision of the official Board set up by the Navy Department itself, regardless of whether such decision were favorable to appellant, as it was here.

Furthermore, the finding of that Board on the only question of importance to the appellant, viz., that it had no liability except such as was provided by State Law, was a question of law, not of fact; and Article 17 does not apply to questions of law nor to the construction of a contract.

Meyne v. U. S. 76 F.S. 814.

What was the decision of any contracting officer from which an appeal to anyone lay? The appellee is not even relying upon any of the 3 consecutive and varying estimates of amount of loss announced by the contracting officer, Captain Ball. None of them are made the basis of the Government's claim. Appellee is relying solely on an ultimatum, not of the contracting officer, or even of the Navy itself, but of the Comptroller-General of the United States asserting baldly that appellant owes the Government a specified sum. Does appellee think that either Article 17 or any law or regulation requires an appeal from the Comptroller-General to the Secretary of the Navy or to anyone else?

Next, appellee urges (Br. p. 14) that Naval Regulations cited by it, as well as 5 *U.S.C.A. Sec.* 1009c and 41 *U.S.C.A. Sec.* 113, 117, provide for seeking administrative remedies therein provided. We can see no pertinency or applicability of any of the cited regulations or statutes to the question of the admissibility or sufficiency of Exhibit 3, to which question appellee addresses these references.

Assuming arguendo that 34 *C.F.R.* 111 creates a Bureau of Supplies and Accounts, and that by virtue of the provisions of that regulation, transcripts of records and accounts of that bureau, properly identified, and with some opportunity for appellant to inspect and satisfy itself as to their accuracy or correctness, might have been admissible to establish appellee's case *prima facie*, under 28 *U.S.C.A. Sec.* 1732 or *Sec.* 1733, that cannot mean that the mere conclusion of the Comptroller-General, in charge of an entirely different agency or bureau or office, would be admissible. This is the crux of appellant's of objection to Exhibit 3: it makes no *prima facie* case and gives no opportunity to cross examine.

A search of the provisions of 34 *C.F.R. Sec.* 31.324-328 fails to disclose to us any disputes that may be determined by contracting officers, which by any stretch of imagination could embrace the question of the amount of loss chargeable to a contracting warehouseman in case of fire.

It is true that 34 *C.F.R. Sec.* 32.2, 32.3, provide that the Navy shall dispose of surplus property at the best price obtainable. Certainly Exhibit 3 gives the appellant no opportunity to discuss or question whether such prices were obtained; and anyone who has had occasion to observe some sales of Government surplus property may properly question whether the best prices were obtained. Even if the regulations did not have such a provision as to prices, the appellant had the legal right to such mitigation of damages as sales at the best prices reasonably obtainable would effect, and no administrative agency or regulation can take away that right under our present form of government. But to prove that appellee so acted, or to give appellant any op-

portunity either to verify or to disprove that such action was taken, by the mere introduction of Exhibit 3 alone, is obviously impossible; and any attempt to do so violates appellant's elementary and fundamental legal rights.

We do not understand that the provisions of 5 *U.S.C.A.* 1009c cited on page 15 of appellee's brief can have any reference to the question here. It relates only to "agency action." "Agency action" is defined by *Sec. 1001 (9)* as the whole or any part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. The action here, consisting of the determination of the amount of loss, is none of those. No statute has been pointed out which gives the Comptroller-General authority by fiat alone to say, "I have settled the claim of the Government against Lomax and Lomax owes the Government so many dollars." The scope of "agency action," as contemplated in *Sec. 1009c*, is described by the Court in syllabus 4, *Snyder v. Buck*, 75 *F.S.* 902 as follows:

" 'Agency action' within provision of Administrative Procedure Act for judicial review except so far as 'agency action' is by law committed to agency discretion includes making of contracts, making of loans by lending agencies of the government, issuance of passports and visas by Department of State, issuance of visitor's permits by Immigration and Naturalization Service, and other matters in which agency is permitted by law to reach a conclusion on basis of its own discretion. Administrative Procedure Act of 1946, *Sec. 10(a-c)*, 5 *U.S.C.A.* *Sec. 1009 (a-c)*." The list may not be exhaustive but is illustrative.

41 *U.S.C.A.*, 113, 117, likewise treat of situations entirely different from the case at bar and do not seem capable of a construction so elastic as to include it. This is not a claim

of a contractor for compensation under his contract but a claim of the Government against a citizen for the value of property lost by fire.

In conclusion of this phase of the matter, it seems clear to us that none of the citations to the regulations or statutes has any pertinency to the question here; and we will proceed to examine appellee's authorities on the real question presented, viz., the effect of 28 *U.S.C.A. Sec.* 1732-1733.

We repeat the statement of our opening brief, that Exhibit 3 was not a record of account, or of a transaction, the original of an authenticated copy of which would be admissible under either section. Appellee says (p. 17) that appellant had every means of arguing to the Court the lack of personal knowledge of the entrant or maker. Appellant did so in making its objection to the introduction of the exhibit. Appellee says appellant had ample means pending the trial to take depositions to arrive at the correctness of the memo; but we had no reason to believe that appellee would not offer the best evidence or authenticated copy thereof in the usual manner of proving any account.

Appellee quotes (Br. p. 18) from *U. S. v. Gaussen*, 86 *U. S.* 198. But appellee's quotation, justifying the admission of evidence there, does not relate to "certificate of balances merely," such as Exhibit 3. The decision continues as follows:

"Nor is the objection, that the reports charge Barrett with gross sums and with balances without giving details, sustained by the facts.

"The reports are made up with much particularity, and give the items on each side of the account. It is not

a case of a *certificate of balances* merely. We are not authorized, however, to regulate the manner in which the departments shall keep their books, or to prescribe the minuteness of the detail. The items in these reports are manifestly made up from statements and details of the daily business furnished by the collector. They are necessarily condensed when carried to a ledger account, and the results of many items or of some considerable period of time, may be stated in a briefer form than they stood upon the original entries. The means of particular information are open to either party. We see no objection on this ground to the evidence now presented, and are of the opinion that there was error in its exclusion."

Manifestly the objection there that the reports were fragmentary and incomplete was not sustained by the facts.

Likewise, in *Soule v. U. S.*, 100 U.S. 8 (Appellee's Br. p. 18), the Court was dealing with a *transcript* from the books of the Treasury Department and not with a mere certificate of claimed balance alone. Immediately preceding the matter quoted (Br. p. 18), the point decided is defined: "When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a *transcript from the books* and proceedings of the Treasury Department, certified by the register, and authenticated under the Seal of the Department, shall be submitted as evidence."

In *U. S. v. Bell*, 111 U. S. 477 (Br. p. 18), a transcript from the books, not the mere certificate of the officer that he found a certain amount owing, was involved.

In *Moses v. U. S.*, 116 U.S. 571 (Br. p. 19), it is true that the Exhibit admitted included a certificate similar to Exhibit 3 here; but the point of that decision which approved the admission of the Exhibit was that it included also *tran-*

script from the books of the defendant containing the account involved, items both debit and credit. In Exhibit 3 here, there is a statement of purported gross items lost and salvaged and of purported values; but that statement does not purport to be a transcript from any books of account, or based on any entries made under the shop book rule, or to be a copy or transcript of any actual record of any transaction or occurrence.

U. S. v. Pierson, 145 F 814 (Br. p. 19, 20), likewise requires a *transcript of books* showing prima facie the account sued on; the Court saying, "To be admissible the transcript should not be a mere statement of resultant balances."

And *U. S. v. Du Perow*, 208 F 895 (Br. p. 20), is appellee says, of like effect.

We pass without discussion appellee's comment (Br. pp. 20-21) on the cases cited in appellant's opening brief, and merely reaffirm our views presented in that brief that they strongly support appellant's contention for the reasons there stated; except that, with reference to appellee's statement (p. 21) that in the *Rugo* and *Mohawk* cases the appraiser could have been called as a witness for cross examination which could not have been done with the Naval Board of Inquiry, we merely observe that we are dealing in this law suit with nothing the Board had anything to do with as to the amount of fire loss, and that as to the certificate Exhibit 3, made by the Comptroller-General, had he been called as a witness, he would have had no knowledge of the facts upon which his conclusion is based, and could not have testified with regard to such facts, nor could he, without some foundation, have qualified to express his conclusion stated in Exhibit 3.

On p. 22 of its brief appellee again misconceives the action of the Naval Board of Inquiry. It did not find the amount of loss. Between its investigation and the issuance by the Comptroller-General of Exhibit 3, a matter of 23 months, the contracting officer had made three different estimates of such loss and no final estimate or purported determination thereof was made by anyone until Exhibit 3 was prepared. The loss now claimed by the Government consists of no estimate or computation made by that Board nor even by the contracting officer in his three attempts so far as the records show. None of them are of any concern here. There never was any dispute or opportunity for one regarding the amount claimed in Exhibit 3. The Comptroller-General merely announced that a certain amount, not therefore named or suggested, was owed by the defendant. The appellant does not claim, as suggested in the closing paragraph on page 22 of appellee's brief, that the Government necessarily had to produce witnesses to testify as to their personal recollection of items lost, salvaged or damaged, and their value. Of course, if they had been produced, they could have been cross examined. But such persons, even if not produced, must have made regular entries or records. *Title 28 U.S.C.A. Sec. 1732 and 1733* would require a transcript of such entries or records and that was what the appellant was entitled to expect and what the Government did not produce at the trial.

Respectfully submitted,

WITHERSPOON, WITHERSPOON AND KELLEY,

WILLIAM V. KELLEY,

Attorneys for Appellant.

No. 12422

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12422

PETITION TO REMAND

HARVEY ERICKSON,

United States Attorney

FRANK R. FREEMAN,

Assistant United States Attorney

Attorneys for Appellee

AUG 10 1930

PAUL P. O'BRIEN,

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No. 12422

IN THE
United States
Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

} No. 12422

PETITION TO REMAND

The appellee respectfully prays that this cause be remanded to the District Court for the reception of further evidence as to the amount of damages. The appellee respectfully prays that this Court grant a rehearing as to the propriety of remanding this case to the District Court for the reception of evidence in accordance with the Court's opinion filed July 14, 1950.

I. Facts Justifying a Remand.

There are only two parts to this law suit. The first question was whether or not there was a contract between the Lomax Transportation Company and the United States. This court decided that phase of the case in favor of the appellee and decided that there was a contract of insurance but that the trial court erroneously considered the "Certificate of Settlement" of the General Accounting Office as making a prima facie case for the appellee on the question of the amount of damages.

In the interest of fairness and justice the appellee should be permitted to submit competent evidence if it can do so in accordance with the opinion. This could result in no substantial hardship to the appellant and would enable the trial court to consider the amount of damages. It should be pointed out that there was no jury trial in the case and that the matter was tried before the Court. The Court failed to hear verbal testimony of any nature but merely rendered judgment on the certificates of the General Accounting Office after holding the matter under advisement for some time. As the trial court erroneously considered this as evidence of the amount due and owing, that evidence of course must be stricken but it would only be fair and equitable to permit the Court to consider other evidence, if the same is produced, as to the amount of damages sustained by the appellee.

These facts are absolutely certain, that a fire did occur and that property belonging to the United States was destroyed. The mere fact that proper evidence was not received as to the value of that merchandise destroyed would be a fair and just reason for sending the case back to the trial court for further consideration.

II. The Propriety of Remanding This Case

The case of *United States v. Clark*, 96 U. S. 37, was a case in which the Supreme Court held there was no competent evidence before the Court of Claims as shown by their own finding of the contents or amount of the lost package. The Court of Claims' judgment was erroneous because it was based on inadmissible evidence. In that case the Supreme Court remanded the case to the Court of Claims directing that a new trial or rehearing be had and the question to be determined be limited to the contents of the lost package. That case is analagous and directly in point with the case at bar inasmuch as this Court has now held that the evidence received on behalf of the Government is incompetent. Also, in the case of *Norfolk Southern Railroad Company v. Ferebee*, 238 U. S. 269, the Supreme Court of the United States remanded the case for trial on the issue of damages alone, excluding the question of liability since there was no question of negligence or contributory negligence. Also, in the case of *Gasoline Products Company v. Champlin Refining Co.*, 283 U. S. 494 at page 500, the Court laid down the principle that a new trial on a single issue may not properly be resorted to unless it clearly appears that the issue to be retried is so distant and separable from the others that a trial of it alone may be had without injustice.

In that case the Court points out that the general rule is where the issues are separate and distinct and a retrial can be had of one of the issues independent of the others that a retrial can be had of the single issue. In employers liability cases oftentimes the question of negligence or contributory negligence is so interwoven that it is impossible to proceed without a completely new trial.

In the case at bar there are two independent, separate and distinct issues, the first of which has been determined in favor of the appellee. The second, being the amount of damages, could, in the interests of fairness and justice, be determined by the trial court with the trial court following the opinion of this court as to the weight and effect to be given to the General Accounting Office's memorandum under Sections 1732 and 1733 of Title 28. No hardship or prejudice could result to the appellant if the Government were able to meet this standard of proof because interest would not run on the judgment until the amount thereof would be ascertained or liquidated.

CONCLUSION

It is respectfully urged that the opinion be amended to the effect that the case be remanded to the trial court for the ascertainment of the amount of damages.

Respectfully submitted,

HARVEY ERICKSON,

United States Attorney

FRANK R. FREEMAN,

Assistant United States Attorney

Attorneys for Appellee

No. 12,423

IN THE

United States Court of Appeals
For the Ninth Circuit

EMIL NEWMAN,

Appellant,

VS.

THE STATE OF CALIFORNIA, THE CITY &
COUNTY OF SAN FRANCISCO, EDMUND
G. BROWN, MARSHALL E. LEAHY,
FRED N. HOWSER, JESS HESSION, L.
LESLIE VOGEL, ELMER E. ROBINSON,
et al.,

Appellees.

BRIEF OF APPELLEES
CITY AND COUNTY OF SAN FRANCISCO
(A MUNICIPAL CORPORATION), AND
ELMER E. ROBINSON.

DION R. HOLM,

City Attorney

of the City and County of San Francisco,

THOMAS M. O'CONNOR,

Deputy City Attorney

of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,

Attorneys for Appellees

*City and County of San Francisco
and Elmer E. Robinson.*

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No. 12,423

IN THE

**United States Court of Appeals
For the Ninth Circuit**

EMIL NEWMAN,

Appellant,

vs.

THE STATE OF CALIFORNIA, THE CITY &
COUNTY OF SAN FRANCISCO, EDMUND
G. BROWN, MARSHALL E. LEAHY,
FRED N. HOWSER, JESS HESSION, L.
LESLIE VOGEL, ELMER E. ROBINSON,
et al.,

Appellees.

**BRIEF OF APPELLEES
CITY AND COUNTY OF SAN FRANCISCO
(A MUNICIPAL CORPORATION), AND
ELMER E. ROBINSON.**

The motion of defendants and appellees City and County of San Francisco, a municipal corporation, and Elmer E. Robinson, to dismiss the complaint was filed under Rule 12 (b), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. Sec. 723 (c), on the following grounds: (1) Lack of jurisdiction over the subject matter; (2) Lack of jurisdiction over the per-

son; * * * (6) Failure to state a claim upon which relief can be granted. The order granting the motion to dismiss the complaint was granted on September 19, 1949, by the Honorable Louis E. Goodman.

JURISDICTION OF THE FEDERAL DISTRICT COURT.

The Federal District Court has original jurisdiction of civil actions under 28 U.S.C.A. Sec. 1331, June 25, 1948: c. 646, 62 Stat. 930, and 28 U.S.C.A. Sec. 1343, June 25, 1948: c. 646, 62 Stat. 932.

28 U.S.C.A. Sec. 1331 provides as follows:

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States.”

Section 1343 provides as follows:

“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

In the complaint filed by appellant in the District Court and in appellant's brief on appeal it is stated that there has been a violation of the rights guaranteed to him under the Fourteenth Amendment of the Constitution of the United States by the actions of appellees City and County of San Francisco, a municipal corporation and Elmer E. Robinson. In order for the District Court to have jurisdiction concerning the matter, the appellant must show that his case comes within the purview of either of the above-quoted provisions of law.

THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER, AND APPELLANT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In determining whether a complaint presents a federal question within the jurisdiction of the federal Courts, the allegations of the complaint, and not facts which may be developed or the merits of the case, control. A mere statement that a violation of a constitutional guarantee has been perpetrated is not sufficient. The complaint must contain allegations to show how or in what manner a complainant has been denied

any of the rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Levering and Garrigues Co. v. Morrin, 53 S. Ct.

549, 289 U.S. 103, 77 L. Ed. 1062; affirming 61

F. (2d) 115, certiorari granted 53 S. Ct. 118,

287 U.S. 590, 77 L. Ed. 515;

Ex parte Paresky, 54 S. Ct. 3, 290 U.S. 30, 78

L. Ed. 152;

Toncray v. City of Phoenix, 47 F. (2d) 448;

35 C.J.S. (Federal Courts) 913.

In 35 C.J.S. (Federal Courts) at 913 it is stated as follows:

“Jurisdiction cannot rest on mere inference, conjecture or argument, but it must appear, in accordance with the rules of good pleading, by positive averments and specific allegations of fact which show clearly and distinctly that a question under federal law is involved. * * * A mere formal statement that the action arises under the constitution or laws of the United States, or that it arises under or involves a particular law is insufficient. The circumstances out of which the federal question arises must be clearly and distinctly stated.”

A reading of the allegations of the complaint demonstrates that appellant has failed to show how or in what manner there has been a denial to him of any constitutional rights or guarantees by the appellees herein.

UNDER THE ALLEGATIONS CONTAINED IN THE COMPLAINT
IT ALSO AFFIRMATIVELY APPEARS NO CONSTITUTIONAL
GUARANTEES OF APPELLANT VIOLATED BY ACTIONS OF
ANSWERING APPELLEES.

Further, as far as the answering appellees are concerned, the allegations of the complaint affirmatively show that neither the actions of appellee Elmer E. Robinson or appellee City and County of San Francisco, by and through the actions of any of its officers or officials, has deprived appellant of any of the constitutional rights or guarantees of the Fourteenth Amendment to the Constitution of the United States or any other of the rights, privileges and immunities guaranteed by the Constitution of the United States.

The adverse decision of a state Court does not violate the constitutional guarantee of the Fourteenth Amendment of due process of law.

Worcester County Trust Co. v. Riley, 58 S. Ct.

185, 302 U.S. 292, 82 L. Ed. 268, affirming 89 F. (2d) 59;

12 *Am. Jur.* (Constitutional Law), page 273.

The guarantees of the Fourteenth Amendment of the Constitution of the United States are not violated by decision of a state Court on a demurrer. The guarantee of due process by judicial action makes essential a hearing and a notice of hearing be given to the parties involved in such action. Proceedings in a state Court long established as regular mode of procedure and of which reasonable notice and opportunity to be heard are given, satisfy the requirements of due process of law. Proceedings upon demurrer have been

a long established and regular mode of procedure in the Courts of California. (California Code of Civil Procedure, Sections 430-434.)

Hardware Dealers Mutual F. Ins. Co. v. Glidden Co., 284 U.S. 151, 76 L. Ed. 214, 52 S. Ct. 69;

12 *Am. Jur.* (Constitutional Law), page 280.

In 12 *Am. Jur.* (Constitutional Law), page 280, the rule is stated as follows:

“The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein; nor is it designed to reach errors in the administration of the laws not involving jurisdiction of the subject or of the parties. The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as fundamental, such as the requirements of hearing and notice, or unless it is unreasonable or arbitrary. There is nothing in the Federal Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.

When a regular course of justice by an efficacious remedy is secured by the law of the state, the constitutional requirement contained in the Fourteenth Amendment is satisfied. It has sometimes been broadly stated that the adjudication of

a person's claims by the courts of his own state is due process of law, that what is due process of law in a state is regulated by the law of the state, that the requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government, or that the law of the state is the law of the land. If the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a Federal court will interfere on the ground that there has been a failure of due process. The proceedings in a state court need not be by any particular mode if they constitute a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it."

It is respectfully submitted the motion to dismiss the complaint herein was properly granted.

Dated, San Francisco, California,

May 29, 1950.

DION R. HOLM,

City Attorney

of the City and County of San Francisco,

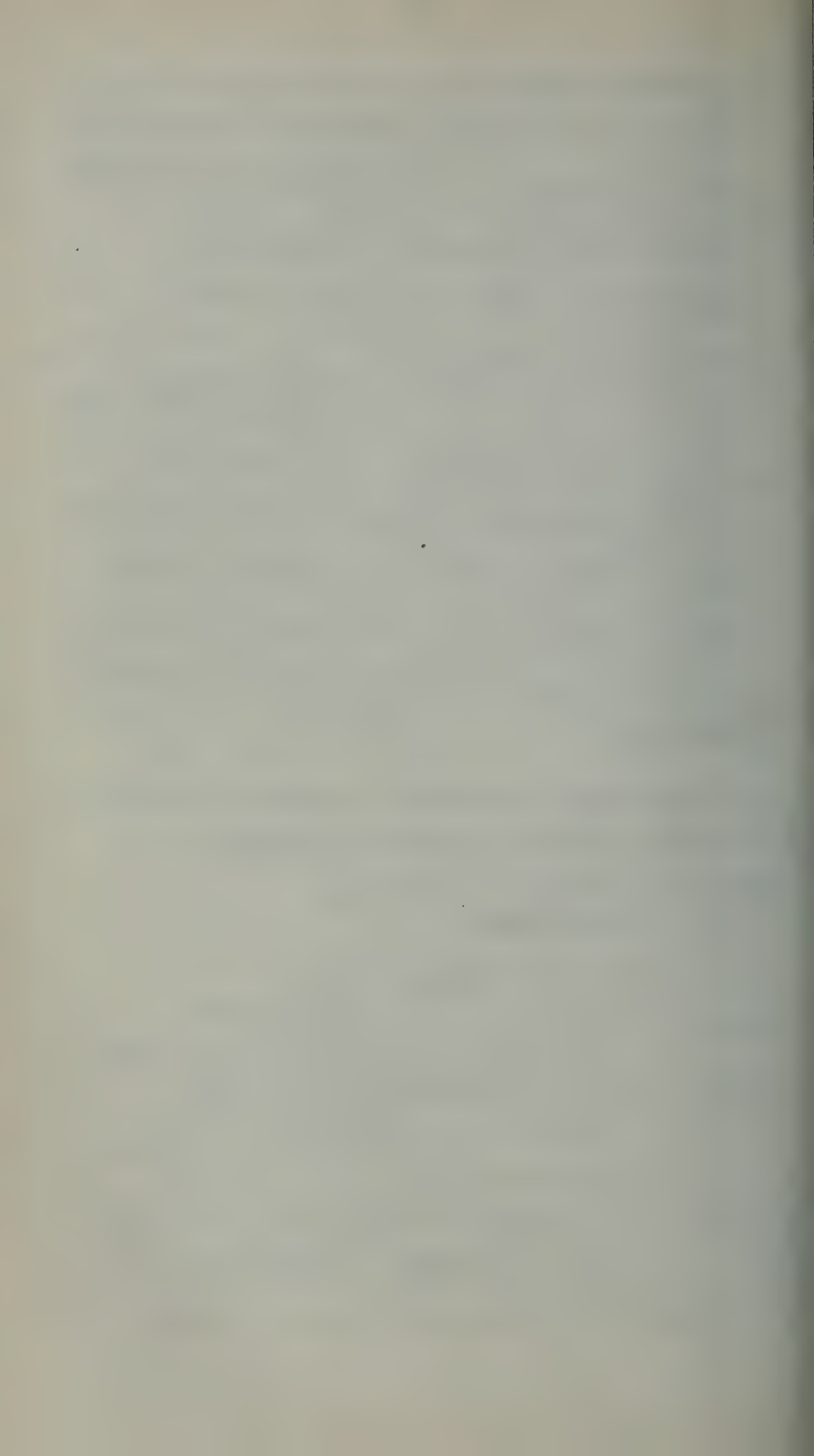
THOMAS M. O'CONNOR,

Deputy City Attorney

of the City and County of San Francisco,

Attorneys for Appellees

*City and County of San Francisco
and Elmer E. Robinson.*



No. 12,424

IN THE
United States Court of Appeals
For the Ninth Circuit

VINCENT HALLINAN,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

ROBERT B. McMILLAN,

Assistant United States Attorney,

Attorneys for Appellee.

JAMES M. McINERNEY,

Assistant Attorney General of the United States,

JAMES W. KNAPP,

Attorney, Department of Justice,

Of Counsel.

FILED

FEB 24 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,424

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VINCENT HALLINAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

(a) The United States District Court for the Northern District of California had jurisdiction over the appellant and power to punish him summarily for contempt committed in the presence of the Court under Section 401, Title 18, United States Code and Rule 42(a) F.R. Crim. P.

(b) The statutory provisions and the rule involved are as follows:

Chapter 21 of Title 18, United States Code provides:

§401. Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discre-

tion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§402. *Contempts Constituting Crimes.*

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the Court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the

Court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open Court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the Court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is

entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the Court shall enter an order fixing the punishment.

STATEMENT OF THE CASE.

This is an appeal from an order entered on November 22, 1949, in the United States District Court for the Northern District of California adjudging the appellant Hallinan guilty of contempt and sentencing him to six months imprisonment. The judgment was accompanied by a certificate dated November 22, 1949, and signed by United States District Judge George B. Harris, certifying that the conduct for which the appellant was being punished was committed in the presence of and was seen and heard by said judge during the sessions of the United States District Court for the Northern District of California. The certificate specifies the facts which constituted the contempt by the appellant through the means of incorporating by reference and attaching certain parts of the transcript in the case of *United States v. Harry R. Bridges, et al.*, in which the District Judge made an oral recitation of the factual events constituting contempt by the appellant. (R. 50-68.)¹

¹Appellee here adopts the method used by appellant in referring to the record. Pages in Volume I are designated by the letter R; pages in Volumes II, III, and IV are designated by the letters Tr.

SUMMARY OF THE FACTS.

(a) Brief chronology of events.

Appellant Hallinan was counsel for Harry Bridges, a defendant in the case of *United States v. Bridges, et al.*,² which went to trial on November 14, 1949, before Judge George B. Harris in the United States District Court for the Northern District of California. (Tr. 1.) On the afternoon of Thursday, November 17, appellant began his opening statement. (Tr. 489.) After the jury had retired the Government protested against appellant's tactics and the Court, after considerable argument by appellant and other counsel on both sides, made certain rulings pertaining to the issues involved in the case and the scope and character of permissible statement to the jury. (Tr. 511-541.) The next morning appellant continued his opening statement in such a manner as to invoke continuous objection and necessitate frequent admonitions by the Court to the jury and to the appellant. (Tr. 545-586.) On the afternoon of Monday, November 21, appellant cross-examined the first government witness, and persistently sought to inquire into matters which the Court previously had ruled were not relevant to the issues in the case. (Tr. 700-759.) After the jury was dismissed for the day, there followed a brief colloquy between Court and counsel at the end of which the Court told appellant, "I have tried to make the ruling, but unfortunately you have seen fit to depart from them, consistently and persistently. I think we will meet at 9:30 and discuss the matter." (Tr. 772.)

²The opinion of the District Court as to certain issues of law raised by the pleadings in that case appears in 86 F. Supp. 922.

On Tuesday, November 22 at 9:30 A.M. the Court met with counsel, including appellant, in the absence of the jury, at which time the Court made the following statement:

In this matter there are several phases to be referred to. Particularly the Court has been concerned about the events of recent days, and in particular I refer to the course of conduct of Mr. Vincent Hallinan representing the defendant, Mr. Harry Bridges. The record of events which I am about to refer to presents a series of acts of misbehavior on the part of Vincent Hallinan which if allowed to continue without comment on my part or official judicial action, might well disrupt the orderly processes of this trial. * * * In addition, Mr. Vincent Hallinan, by his studied persistent and inflammatory course of conduct in flouting the authority and orders of the Court has attempted to impair the effectiveness of this Court as an instrument of the judicial process. That he was wilfully attempting to evade the rulings and orders of the Court is manifest from the record of the proceedings of the trial, all of which occurred in my presence.

Yesterday afternoon, Monday, November 21st, it became quite apparent to the Court that Vincent Hallinan would, unless prevented by prompt and firm judicial action run unbridled and roughshod in the further progress of this trial. I was prompted then and there to make the order and findings which I am now about to make. However, to the end that I review coldly and dispassionately the transcript in the more pleasant environment of my chambers rather than attempt

precipitous conduct, I read and reread and studied the transcript of the Court's proceedings from the very inception of the trial until the close of the proceedings, and I so read until the very early morning hours.

As I read and continued to read, coldly, dispassionately, my path became clearer and the course of my judicial conduct became manifest. The primary obligation imposed upon this Court or any Court worthy of the name is to maintain the orderly processes of the law and the due and proper administration of justice. These federal Courts represent a bulwark of our democracy and respect for them must be maintained by the judicial officers charged with that responsibility. I say to you, Mr. Hallinan, long after the case of *United States v. Harry Bridges* has become judicial history, long after this Court has gone to whatever happy reward judges may have, these Courts will remain as beacons in our judicial system, wherein, we hope, expect and pray that the rights of men may be adjudicated without regard for station in life or race, color or creed.

However, there is an anomaly apparent throughout the country today and exemplified, perhaps, in some of our more recent trials, in that those who cry so earnestly for protection under the mantle and cloak of our Constitution of the United States would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system. If I permitted this matter to go on unheeded, it would, in my opinion, represent a tragic commentary on our system, orderly

as it is, in the administration of justice. My present task is not a pleasant one, and I approach it with a degree of care and a detached judicial aloofness.

Accordingly, to the end that there shall be no mistake hereafter in the record concerning my views and the conclusions I reach, I shall review the record as the basis for an order and certificate of contempt required under Title 18, Section 401, paragraph 1. (Tr. 773-775.)

The Court then orally recounted the events which it charged constituted contempt and appellant was afforded an opportunity to express his view of the Court's action (Tr. 776-809, 810-816, 838-848) and that afternoon the Court formally adjudged appellant to be guilty of contempt of Court and sentenced him to six months imprisonment and ordered that appellant's name be stricken from the rolls of lawyers of the Federal Court for the Northern District of California, Southern Division. (Tr. 847-848.) Thereafter the Court engaged in discussion with counsel and the defendant Bridges as to what course should be pursued with respect to appellant's continuance in the case as counsel and finally granted appellant a stay of execution until the completion of the trial. (Tr. 848-871.) In connection with the stay of execution the Court said: "Automatically, by granting the stay of execution of judgment and sentence, Mr. Hallinan is restored to all rights of this Court as practitioner, counselor and solicitor. How else could he practice before this Court if I did not set aside that part of the order." (Tr. 871.)

(b) The certificate.

The Court recited the events which had occurred during the course of the opening statement and examination of the first witness which constituted misconduct by appellant. (Tr. 776-809.) This recitation was included in the Court's certificate in conformity with Rule 42(a) F.R. Crim. P. by reference, a copy of that part of the transcript being annexed to and made a part of the certificate. (R. 51-68.)³

At the outset of the recitation of events the Court said:

Adverting to the proceedings on Thursady, November 17, 1949, it became apparent to the Court that defense counsel, Vincent Hallinan, was not making an opening statement in any judicial sense, but was using it as a medium and sounding board for dragging in before the jury irrelevant, incompetent and inflammatory matter, with the studied and avowed purpose of prejudicing this prosecution in the light of events, incidents and characters, having no place in the proceeding before the jury. Hopeful that I might define the responsibilities of counsel both for prosecution and defense and the Court, we engaged in a lengthy discussion in the absence of the jury, attempting to avoid any further conduct on Mr. Hallinan's part in the future to the end that the trial proceed in an orderly judicial fashion. (Tr. 776-777.)

³The copy of the certificate contained in Vol. I of the record which was furnished to appellee is marked pp. 51-68, but only p. 51 is contained in the record. Therefore, the citations are to Volume and Page of the transcript rather than to pages of the certificate.

The certificate, through the recitation of events incorporated therein by reference, first relates the rulings which were made on the objections raised by the Government to appellant's opening remarks on the afternoon of November 17, 1949. It points out that the Court told appellant that his remarks were "creating an atmospheric quantity at this stage designed to prejudice and inflame the jury" (Tr. 777), that the previous administrative matters concerning the defendant Bridges were "moot, irrelevant and immaterial" and that any reference thereto would "tend to prejudice rather than clarify the issue" (Tr. 778), and that it would sustain objections to inflammatory remarks concerning the existence of a conspiracy against the defendant Bridges by possible government witnesses. (Tr. 779.) It next relates that on the following morning the Court took ten or fifteen minutes to caution the jury as to the province of an opening statement (Tr. 780) and then cites instances in which appellant indulged in remarks violative of the Court's previous rulings concerning the scope and character of the opening statement. It states that appellant soon "lapsed into a violation of orders" referring to an incident described on page 550 of the transcript where objection was sustained to comments upon previous accusations that the defendant Bridges was a member of the Communist Party under the name of Harry Dorgan, and to another occasion set forth on page 554 of the transcript where objection was sustained because of appellant's discourse upon internal warfare between rival labor organizations in which the de-

defendant Bridges was involved. (Tr. 781-782.) The Court then sets forth a passage taken from the transcript at page 555 in which appellant made a violent attack upon the reputation of a man whom he supposed would be a witness in the case calling him "a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas, a man who has been arrested for brawling and assault in half the Ports of the world," and which necessitated an admonition by the Court. (Tr. 782-783.) It then relates that a few minutes later "Mr. Hallinan again lunged or launched into the same demeanor, same conduct, persistent, studied as it was" (Tr. 783) referring to the statements of appellant appearing at page 558 of the transcript. The certificate quotes an objectionable discourse by appellant upon previous deportation proceedings against the defendant Bridges and in which appellant said "The United States House of Representatives passed against Harry Bridges the only bill of attainder ever passed in the United States". (Tr. 784.) It is certified that almost immediately appellant accused government agents with having tapped the defendant Bridges' telephone wires in 1937 and that as a result the Court was required to caution the jury to disregard the statement. (Tr. 786-787.) The Court then set forth the text of appellant's remarks about the alleged mistress of a man named Lundeborg which prompted the Court to advise appellant that "This is not an opening statement either traditionally or in any concept that I have ever heard of" and that an opening statement "is not a

sounding board wherein you may give vent to the external and immaterial matters that have existed over a period of many many years.” (Tr. 788-789.) Reference is then made to page 569 of the transcript where the Court found it necessary to admonish appellant for a wholesale characterization in vile terms of all government witnesses as perjurers and low people. (Tr. 790.) At this point the Court indicated that its patience was being exhausted. It is pointed out that shortly thereafter appellant made slighting remarks relative to the activities of the F.B.I. in connection with Bridges. (Tr. 791.) The next reference is to page 574 of the transcript which sets forth appellant’s argument to the Court in the presence of the jury that he should be permitted to attack the credibility of unnamed and unknown witnesses. (Tr. 791.) The certificate sets forth verbatim appellant’s statement that the defendant Bridges refused to accept \$50,000 in 1934 “to throw” a strike, and points out that the Court was forced to caution the jury to disregard that statement. (Tr. 792.) Next, the certificate relates that the Court sustained an objection to appellant’s discourse upon labor troubles in Hawaii which appears in the transcript at page 580 (Tr. 792) and that shortly thereafter upon objection by the government that appellant was making an argument (see page 582 of the Transcript) the Court was again required to admonish the jury to disregard appellant’s statements. (Tr. 793.)

The certificate points out that on two occasions appellant was disrespectful. Once when the Court asked

him if he had the benefit of assistance from associate counsel to which he replied "Yes—who made the motions Your Honor treated with contempt" (Tr. 778), and again when he referred to the Assistant United States Attorney, Mr. Robert McMillan, as "some little pest." (Tr. 785.)

The Court next took up appellant's conduct with respect to his cross-examination of the first government witness on the preceding afternoon. It was first pointed out that on direct examination the witness had testified that he had been employed by the Bureau of Immigration in San Francisco from April 1941 until April 1948, and that appellant pursued "the same tactics, the same studied performance, the same desire to introduce irrelevant, incompetent and inflammatory matter before the jury." (Tr. 793.) The certificate relates that "Mr. Hallinan had launched into a dissertation upon the deportation proceedings" and that the Court despite its previous rulings found it necessary to reiterate "that there is no issue with respect to the deportation proceedings before this Court, there is no issue upon which the Supreme Court decision would be controlling as a matter of fact or as a matter of law." (Tr. 794.) The Court found that "there is a complete lack of good faith, fair dealing on Mr. Hallinan's part in attempting to lug in or haul by the ears the Supreme Court decision or Mr. Landis' decision" since neither the defendants Schmidt nor Robertson was involved in the prior proceedings. (Tr. 795-796.) Reference is made to appellant's argument to the Court upon the admissibility of evidence pertain-

ing to the Supreme Court decision, Mr. Landis' decision and wire tapping which is found in the transcript at pages 728-730 and the Court's ruling on such matters. (Tr. 797.) The certificate then refers to page 734 of the transcript and repeats Mr. Hallinan's question asking the witness whether he had read the portion of the Supreme Court decision which charged federal agents with "illegal wire tapping of Harry Bridges" and the Court's caution to the jury "to disregard any implications in the question." (Tr. 798.) Reference is made to pages 737-738 of the transcript where appellant continued to inquire of the witness about alleged wire-tapping episodes, and was informed indirectly that his actions might result in his being cited for contempt. (Tr. 798-799A.) The Court certified that "the Court's admonition was still echoing" when appellant asked the witness whether he had been informed by any federal official that Bridges' wires were being tapped and followed by asking the witness whether he had ever made any protest about the wire-tapping of Harry Bridges and whether he had told any government official that he would not be a party to an illegal effort to injure Bridges. Objections to each question were sustained. (Tr. 800-801.) The certificate next sets forth a question by appellant in which he asked the witness whether he learned from a study of the Landis decision that Landis had rejected all 62 government witnesses as liars and perjurers and the statement by the Court that the question "is an attempt to circumvent the ruling of this Court and place before the jury by indirection mat-

ters that have been ruled out, matters that are immaterial and that are irrelevant," which brought a response from appellant that "we have had no ruling upon any such question as that." (Tr. 801-802.) The Court found that the questions were not asked in good faith, were an attempt to besmirch witnesses in advance and inquire into prior deportation proceedings. It found that "the questions, the manner, and the decorum" represented, in the opinion of the Court, a studied plan to destroy in advance the effectiveness and the asserted truthfulness of the witness placed upon the stand by the bland assertion that somewhere, sometime, he might have been associated with an alleged conspiracy, which, of course, Mr. Hallinan has referred to as somewhat fantastic. (Tr. 803.) Reference is made to a question appearing on page 748 of the transcript where appellant again asked the witness whether prior to the 1939 deportation proceedings he had personally had "anything to do with installing a wire-tapping device in Harry Bridges' room in the Hotel Multnomah in Portland" and which resulted in protest by the government counsel on the ground that it dealt with matters prior to witness' government service. (Tr. 804-805.) The certificate states that appellant continued asking the witness about alleged wire-tapping of Harry Bridges' telephone, this time laying the events in New York City in 1941, and that the Court found these questions to constitute "a persistent, studied continuity of conduct, not bordering on contempt, but contemptuous in every form and degree." (Tr. 806.)

(c) The facts underlying the certificate.

At the outset of his opening statement appellant stated that this was the fifth inquiry into the subject before the jury (Tr. 490) undertook a discourse on Bridges' labor activities (Tr. 502-503) charged that various persons engaged in a conspiracy to destroy Harry Bridges (Tr. 504-510) and referred to administrative proceedings designed to inquire into Bridges' deportation. (Tr. 508, 505.) At the end of the daily session the government protested against appellant's tactics (Tr. 511-513), and the Court entertained argument designed to ascertain the scope of permissible statements to the jury. (Tr. 513.) During the course of that argument the Court ruled that prior deportation issues were irrelevant to the issues involved in the case at bar (Tr. 513, 516, 531), that Bridges' waterfront labor activities were immaterial to the issues in the case (Tr. 516), that reference to trade union, waterfront and employer-employee relations was improper (Tr. 516-517), and that in characterizing all of the government witnesses, whoever they might be, as members of a conspiracy to destroy Bridges was indulging "in speculation on speculation" and creating "an atmospheric quantity" designed to prejudice and inflame the jury in connection with any sage, considered judgment they may have on evidentiary matters. (Tr. 528-529.) The Court specifically stated that he held the administrative matters to be moot, irrelevant and immaterial, but that appellant could refer to the transcript for purposes of impeachment and that any reference to them at this point would tend to prejudice the issue. (Tr. 531.) The Court also made it clear

that he would sustain objections to inflammatory speech relative to a conspiracy to convict Bridges of a crime by means of perjury. (Tr. 535.)

The next morning the Court stated to the jury the function of an opening statement. (Tr. 541-545.) When Mr. Hallinan resumed his opening statement he immediately characterized all future government witnesses as "liars and perjurers" (Tr. 546) and launched into a discussion of prior accusations by rival union adherents that Bridges was a Communist, informing the jury that such accusations were founded upon manufactured evidence and discovered to be untrue. (Tr. 547, 548-550.) The jury was admonished and appellant was advised to keep his statement within the bounds of the issues involved and not to indulge in blanket assertions to discredit all the witnesses produced by the government in one fell swoop. (Tr. 551.) Appellant immediately continued his statement relative to union disputes between Bridges' union and the A.F. of L. and Bridges' difficulties in that respect. (Tr. 553-554.) An objection was sustained but appellant continued the same discussion (Tr. 554) to which another objection was sustained. (Tr. 555.) Appellant immediately continued his statement with inflammatory attacks upon the character of a rival union leader (Tr. 555), making it necessary for the Court to explain to the jury that appellant's statements were argumentative and not proper at that time and to admonish appellant that "the excoriations and vituperative matter bearing upon Mr. Lundeborg and others has no place at the present time" (Tr. 556)

and to advise him that he was going far afield from any opening statement. (Tr. 557.) Despite this admonition appellant continued to attack the character of other named labor leaders, stating that those persons engendered such a hatred and animosity for Harry Bridges that they groomed and instructed witnesses who would later appear and that they had sent two men to murder Bridges. (Tr. 558-560.)

Next appellant began an attack upon government officials saying Bridges' enemies had enlisted them in their activities. (Tr. 560.) Objection was again sustained (Tr. 561) and appellant then stated that "as early as 1936 they caused a warrant for Bridges' arrest on a deportation inquiry to be issued" and that "the U.S. House of Representatives passed as against Harry Bridges the only bill of attainder ever passed in the United States." This invoked a protest by the prosecutors and appellant turned to an attack upon their personalities (Tr. 562), making it necessary for the Court again to admonish him not to indulge himself in such characterizations. (Tr. 562-563.) Appellant persisted in stating that Government officials tapped Bridges' telephone in Seattle in 1937 and that it was a matter of public record. (Tr. 565.) This outburst again elicited an objection which was sustained, appellant indulging in strong argument to the Court. (Tr. 566.) Appellant immediately reverted to vituperative statements concerning a lady secretary employed by Bridges (Tr. 566) which elicited comment from the Court that "this is not an opening statement. Mr. Hallinan, either traditionally or in any concept that I

have ever heard of", and a clear statement that appellant was going beyond proper bounds in his speech to the jury. (Tr. 567.) At this point appellant, in addressing the Court in the presence of the jury, made reference to that day's newspaper headlines concerning the trial (Tr. 567) which brought strong admonition from the Court. (Tr. 568.)

Thereafter, appellant resorted to making an argument to the jury again to the effect that Bridges knew he was being spied upon and investigated, and would therefore not have committed perjury had he been a member of the Communist Party. (Tr. 569-570.) Immediately after the recess appellant began his address to the jury with the statement that Bridges was spied upon and shadowed by the F.B.I. (Tr. 571) and after the objection was sustained continued in the same vein. (Tr. 572.) After he was again admonished appellant returned to a vituperative and inflammatory attack upon certain persons whom he said the government would produce as witnesses against Bridges. (Tr. 573.) When the prosecution objected, appellant argued to the Court in the jury's presence that the defense knew who the government witnesses would be and accused the prosecution of wanting "to sort of write out an opening statement for the defense." (Tr. 574.) Thereafter, appellant continued with a statement that was argumentative in nature necessitating frequent objections by government counsel. (Tr. 575-579.) This culminated in a statement by appellant that the conspiracy against Bridges flowered anew because of the longshoremen's strike in Hawaii and that the

purpose of the prosecution was to break that strike (Tr. 579-580) and ended by returning to an inflammatory and prejudicial characterization of all prospective government witnesses as "hired informers, spies, turncoats; the very swill of humanity", and ex-Communists who will swear any man's life away in order to pick up a few honest dollars of government treasury compensation testifying against Communists, labor leaders and school teachers. (Tr. 581-582.)

On the afternoon of Monday, November 21, 1949, appellant began his cross-examination of the government's first witness. (Tr. 702.) Appellant asked the witness whether it was his duty to keep abreast of the current decisions of the Supreme and Circuit Courts of Appeal relating to immigration matters. The Court promptly ruled that "there is no issue with respect to the deportation proceedings before this court, there is no issue upon which the Supreme Court's decision would be controlling as a matter of fact or as a matter of law." (Tr. 705.) Despite this ruling two questions later appellant asked the witness when he had read the parts of the Supreme Court decision and persisted in arguing the matter at length after objection was sustained. (Tr. 706-734.) During the course of this argument appellant stated that he desired to inquire of the witness to show he was cognizant of wire-tapping, illegal invasions of this man's privacy, that he was part of it, that he either actively participated in it or did nothing to stop it and argued that point to the Court. (Tr. 724-730.) The Court ruled that "these matters of prior consequence had no legal bearing

upon this matter” and made it clear that the defense could not inquire into the matters under discussion (Tr. 730-731) to which appellant rejoined that “I will have to continue to ask such questions to build a record and ask such questions as I may deem advised.” (Tr. 733.)

After the jury returned, the appellant’s first question was “Now Mr. Garner, I suppose it would be a fair conclusion that if you did not read all of the decision of the Supreme Court, at least you read most of it, is that right?” Objection was sustained. (Tr. 734.) Appellant’s next question was, “Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?” The Court thereupon admonished appellant that “the objection is sustained, that it is not in conformity with the ruling, Mr. Hallinan, and is an attempt to bring before the jury matters in obviation of my ruling. I admonish the jury to disregard any implications in the question.” (Tr. 734-735.) Appellant was permitted, however, to ask the witness whether he had any knowledge or information with respect to wire-tapping by government employees or agents in the instant case and received a reply that the witness had no such information or knowledge. (Tr. 735-737.) Appellant then asked “You do have information that the government indulged in illegal wire-tapping upon the two previous deportation proceedings, do you not?” (Tr. 737-738.) Government counsel objected complaining that appellant’s actions constituted contempt and the

Court sustained the objection stating, "The jury is admonished to disregard any implications contained in the question." At the same time, the Court further admonished appellant saying "and I say to you, Mr. Hallinan, your persistent conduct along this line, studied as it appears to be, may well eventuate in the situation that counsel refers to." (Tr. 738.) Appellant persisted by asking in the next question "Did you yourself, in the period preceding, that is, looking toward, the deportation of Harry Bridges, and during that time—not at the present—receive any information from any federal officer or agency that Harry Bridges' wires were being illegally tapped?" When objection was sustained appellant asked "Have you at any time throughout the origin of the proceedings against Harry Bridges, that is back in 1937 or '8 up to the present time, that is, up to today, made any protest of any kind to any agent of the government or any attorney of the government that there was or had been illegal wire-tapping of Harry Bridges?" Objection was again sustained. (Tr. 739.)

Appellant next asked "In your study, whatever study you did make of the Landis decision, you learned that 62 witnesses had been presented by the government against Harry Bridges and that Dean Landis had rejected all of them as liars and perjurers, didn't you find this out?" In sustaining an objection the Court said "It is an attempt to circumvent the ruling of this Court and place before this jury by indirection, matters that have been ruled out, matters that are immaterial, that are irrelevant." (Tr. 740-

741.) After a brief colloquy between Court and appellant, he again asked "Now getting away from these two proceedings that seem to involve me in so much criticism, do you know this, that 60 witnesses, different from those that testified before Landis, testified before Sears and that Sears rejected all but one of them as liars and perjurers, isn't that right, Mr. Witness?" (Tr. 741.)

Appellant turned to other matters for a short period and then returned to the subject of wire-tapping, asking "Prior to the deportation proceedings which were tried in 1939 before Dean M. Landis, did you personally have anything to do with installing a wire-tapping device in Harry Bridges' room in the Hotel Multnomah in Portland?" Objection was sustained and appellant inquired "Did you personally in the year 1941 have any part, or did you participate in any wire-tapping of a telephone in Harry Bridges' room in the hotel in New York City?" Objection was again sustained and appellant followed by asking "Did you personally have any contact with any persons, employees of the United States Government engaged in tapping of telephone wires of Harry Bridges in a hotel in New York in 1941?" (Tr. 749-750.)

Later, on recross-examination of the same witness appellant again sought to examine the witness with reference to his knowledge of the opinion of the Supreme Court in *Bridges v. Wixon* and the opinion of Landis in the 1939 deportation proceedings of Harry Bridges, stating that he wished to accomplish this by reading selected portions of those opinions to the witness and

inquiring whether he had read those parts. (Tr. 753-757.) The jury was dismissed for the day shortly afterward (Tr. 769) and there followed a brief colloquy which has been set forth above in part (a). (Tr. 772.)

ARGUMENT.

Appellant was adjudged guilty of contempt because his conduct was such as to disrupt the orderly processes of the law and prevent the due and proper administration of justice.⁴ Shortly after the foundation of this republic the Supreme Court decided "that courts of justice are universally acknowledged to be vested, by their very creation, with the power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *Anderson v. Dunn*, 6 Wheat. 204, 227. Thus the power to punish for contempt is inherent in all courts since the existence of such power is essential for the preservation of order in judicial proceedings and federal courts have been invested with such jurisdiction since the moment of their creation. *United States v. Hudson*, 7 Cranch 32, 11 U.S. 21; *Ex Parte Robinson*, 86 U.S. 505, 510.

Appellant has been adjudged guilty of contempt because he consistently and wilfully embarked upon a course of conduct which denied the authority of the

⁴Tr. 773-775.

United States District Court—which authority must be vigorously preserved if the Court is to function free from disruption and with public confidence in the unhampered administration of justice.

I.

THE POWER TO PUNISH APPELLANT SUMMARILY FOR HIS MISCONDUCT IN OPEN COURT IN THE PRESENCE OF THE JUDGE CONTINUED ON THE MORNING OF NOVEMBER 22, 1949.

Appellant contends that, because the contempt proceedings were not set in motion until the morning after the last of the acts of misconduct occurred, the Court lacked jurisdiction to punish summarily under Rule 42(a) F.R. Crim. P. He argues that the power to proceed summarily is limited solely to situation where *immediate* action is necessary to protect the Court's official dignity and that in the instant case the Court's action was taken to prevent *future* disruption of the judicial process. (Br. pp. 62-66.)

A. The practical problem.

Where, as here, the acts of contempt interfere with the Court's duty of conducting a trial in an impartial and orderly manner, the judge is confronted with the necessity of enforcing discipline without undue delay to the proceedings at hand. The rights of the litigants are involved and they should not be harmed by the capricious acts of the contemnor. If it were necessary to proceed against appellant in the manner described in Rule 42(b) F.R. Crim. P., the trial of the

cause would be interrupted for a considerable period with attendant inconvenience and expense to the members of the jury, witnesses, defendant, prosecution, and the Court, because under that section it would be necessary to refer the matter to another judge, give the contemnor notice of the charges, hold a hearing, await a decision and possibly an appeal therefrom. In as much as the Court had complete knowledge of all the facts involved, such a delay would serve no useful judicial purpose and would only further impair the administration of justice. That such considerations were here involved is apparent from the record, which shows that after mature reflection the Court reluctantly stayed execution of its sentence and permitted appellant to continue as counsel in the case rather than to delay the trial for several days or weeks and require the defendant Bridges to proceed with an attorney who might be unfamiliar with the facts in the case.

It is submitted that this very situation, affecting as it does, not only the power and dignity of the Court but the rights and interests of persons other than the contemnor, is one of the compelling reasons permitting the imposition of summary punishment where the Court has personally witnessed the contemptuous acts committed in open court. The summary power exists for the purpose of enforcing obedience and decorum without undue interruption to the business pending before the Court. *In re Cary*, 165 Minn. 203, 206 N.W. 402.

B. The Contempt Statutes and Federal Rules of Criminal Procedure.

The power of a Court to punish summarily stems from Section 401, Title 18, United States Code,⁵ which provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as,

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It will be perceived that the foregoing section does not prescribe the procedure under which the power shall be exercised. Section 402, Title 18, United States Code, after setting forth the procedure with respect to indirect contempts specifically states that such procedure shall have no application in cases of misbehavior, as in the instant case, in the presence of the Court. Such contempt said Congress "may be punished in conformity to the prevailing usages at law."

The Federal Rules of Criminal Procedure promulgated by the Supreme Court and approved by the Congress contain a statement of the general procedure

⁵This section was derived from the Act of Mar. 2, 1831 (4 Stat. 487). The history of the statute is summarized in *Nye v. U.S.*, 313 U.S. 33, 45-48.

to be followed in cases of direct contempt. Rule 42(a) permits summary punishment of a criminal contempt "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court." The Advisory Committee's note to Rule 42(a) does not say, as appellant contends (Br. p. 63), that it was intended to follow the suggestions in *Cooke v. U. S.*, 267 U.S. 517, but merely state that the rule "is substantially a restatement of existing law" and cite *Ex parte Terry*, 128 U.S. 289 and the *Cooke* case.

It is significant that neither the statute nor Rule 42(a) contains a specific limitation as to the time in which a Court may act summarily to punish a contempt. Since the rule is but a restatement of existing law it is reasonable to suppose that if the Court was of the opinion that the existing judicial precedents limited the exercise of the power as to time or situations where *instant* action was a necessity it would have so stated in the rule.

C. The decided cases.

The decided cases make it clear that the *sine qua non* of the power to punish summarily is the fact that the misbehavior giving rise to the punishment was committed in the face of the Court and that jurisdiction over the offender attaches at the instant the contempt is committed. It is the personal witnessing of the contemptuous conduct which gives rise to summary jurisdiction. *Ex parte Terry*, 128 U.S. 289 makes this clear. The Court there said, p. 311:

Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred to immediate punishment.

In *Cooke v. U. S.*, 267 U.S. 517, the Supreme Court again recognized the difference between contempts committed in open Court and there observed by the Court itself and contemptuous acts committed nearby which were not heard or seen by the judge. In speaking of the former it said, p. 534:

To preserve order in the Court for the proper conduct of business, the Court must act instantly to suppress disturbances or violence or physical obstruction or disrespect to the Court when occurring in open Court. There is no need of evidence or assistance of counsel before punishment because the Court has seen the offense. Such summary vindication of the Court's dignity and authority is necessary. It has always been so at common law and the punishment imposed is due process of law. Such a case had great consideration in *Ex parte Terry*, 128 U.S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law.

It should be noted that in the *Cooke* case the acts constituting the contempt were not committed in the face of the Court and that the Court decided that under such circumstances imposition of summary punishment was improper.

This Court has previously decided in a case similar to the one at bar that the trial Court may inflict summary punishment for direct contempt the day following the commission of the contemptuous act. *In re Maury*, 205 Fed. 626, 631, (C.A. 9). There the act was committed during the course of the opening statement to the jury, at which time Maury was admonished by the Court, but the plaintiff in error was not called before the Court and fined until the jury retired. This occurred on the afternoon of the next day. The Court referred to the language appearing in *Ex parte Terry*, and said, p. 632:

We are of the opinion that the rule laid down in the case of *Terry* is entirely applicable to the case before this Court. Obviously there can be no distinction between delaying until the next day before making an order adjudging an offender guilty of contempt of court; *jurisdiction of the person of the offender having attached instantly upon the contempt having been committed in the presence of the court.* (Italics supplied)

California State Courts have adhered to this view, *In re Grossman*, 109 Cal. App. 625, 631-632; 293 Pac. 683, 685-686; as have Washington, *In re Willis*, 94 Wash. 180, 184-185; 162 Pac. 38, 39-40; Minnesota, *In re Cary*, 165 Minn. 203, 206 N.W. 402; and Con-

necticut, *Middlebrook v. State*, 43 Conn. 257. The latter case was quoted at length with approval by the Supreme Court in the *Terry* case, (see 128 U.S. at p. 312).

Within the past eight years the Court of Appeals for the 8th Circuit has adopted the rule of the *Maury* case, stating that jurisdiction to punish for direct contempt continues until the trial of the suit is terminated. *O'Malley v. U. S.*, 128 Fed. 676, 684, (C.A. 8), reversed on another ground sub. nom. *Pendergast v. U. S.*, 317 U.S. 412.⁶ Punishment of direct contempts by summary proceedings at a time not immediately subsequent to the commission of the misconduct has been approved by other Courts without discussion of the question involved here. *U. S. v. Hall*, 176 F. (2d) 163; *White v. George*, 195 Ga. 465, 24 S.E. (2d) 787; *Coons v. State*, 191 Ind. 580, 134 N.E. 194; *Ex parte Murray*, 54 Okla. Cr. 437, 23 P. (2d) 220; *Curran v. Supreme Court*, 72 Cal. App. 258, 236 Pac. 975. See "Contempt" by Edw. M. Dangel, §208, p. 100.

In re Oliver, 333 U.S. 257, cited by appellant in support of his contentions (Br. p. 64), like the *Cooke* case, involved a situation in which the Court could have no knowledge that petitioner's acts were con-

⁶The Court of Appeals regarded the facts as presenting an instance of direct contempt and applied the principle of the *Maury* and *Cary* cases. However, the Supreme Court considered it to be a case of indirect contempt and subject to the statute of limitations. The Court pointed out that the question of whether summary punishment for direct contempt could be imposed "at a subsequent term, or a subsequent day of the same term," was a "problem peculiar to direct contempts in the face of the Court" 317 U.S. at p. 419.

temptuous without other testimony to show that he had given untruthful answers to certain questions. The Court there endorsed the decision of the *Terry* case as to power to punish summarily saying, p. 275:

The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

Thus the rationale of the decided cases is that jurisdiction attaches at the moment of the commission of the direct contempt and that punishment may be inflicted summarily because the Court having observed the misconduct has judicial knowledge of the fact and the circumstances surrounding it. In view of this state of things there is no necessity for a hearing to determine facts. This being so, it necessarily follows that it matters not whether the Court acts instantly or awaits a more propitious time at which to act. Where, as here, the contempt occurs during the course of a lawsuit involving the rights of parties other than the contemnor, jurisdiction continues so long as may be reasonably necessary to afford the Court an opportunity to vindicate its authority and the trial judge may in his wisdom for reasons of justice to the parties lay the matter of the contempt aside until an appropriate moment. *In re Cary*, (supra).

This action is in no way detrimental to the person who is in contempt. He is no worse off than he would be had the contempt been punished at the instant it occurred. And a cooling period having been provided, he may be in an infinitely better position. The Supreme Court has recognized that the Courts must act with caution to assure that their acts are not arbitrary or oppressive. In *Cooke v. U. S.*, supra, the Court said, p. 539:

The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the Court is most important and indispensable. *But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions.* (Italics supplied)

Dealing as he was with a course of misconduct covering several days the trial judge exercised great restraint in this matter. He took to his chambers and studied the cold record until early morning. (Tr. 774.) After this period of detached study he was convinced that his earlier judgment had been correct and the very next morning advised the appellant that he was adjudged guilty of contempt. At that time he related the conduct and acts which gave rise to that adjudication.

Moreover, appellant was afforded an opportunity before sentence was imposed, to make an objection to the Court's action (Tr. 810-811) and used this opportunity to launch upon a scurrilous and vile attack upon the judge personally, charging him with being

biased, prejudiced and vindictive toward the appellant personally (Tr. 810-817, 838-847), although appellant had not seen fit to file an affidavit of bias and prejudice on behalf of his client prior to that time.

It is clear that the acts of contempt for which appellant was punished were committed in the face of the Court, were seen and heard by it, were properly certified by the judge in conformity with Rule 42(a) F.R. Crim. P. (R. 51-68), and were found by the judge to be an attempt to impair the effectiveness of the Court as an instrument of the judicial process. (Tr. 773-774.) Jurisdiction attached at the moment these acts were committed and power to punish summarily continued in the Court on November 22, 1949.

II.

THE ACTIONS OF APPELLANT WERE SO REPREHENSIBLE AS TO CONSTITUTE CONTEMPT.

A. Appellant's misbehavior must be considered as a whole.

Appellant was judged to be in contempt because of a series of acts of misbehavior, which were so reprehensible that they were obstructing and hindering the Court in the administration of justice, and, if continued, would have been likely seriously to impair the authority of the Court and prevent the orderly administration of justice. Despite appellant's assertion that he was found to be in contempt solely on the ground that his misconduct, if continued, might disrupt the Court in the future (Br. pp. 8, 63, 65), the

Court specifically found that appellant “by his studied, persistent and inflammatory course of conduct in flouting the authority and orders of the Court has attempted to impair the effectiveness of this Court as an instrument of the judicial process. That he was wilfully attempting to evade the rulings and orders of the Court is manifest from the record of the proceedings of the trial, all of which occurred in my presence.” (Tr. 773-774.)

Thus the question is not whether appellant was correct in his theory of the defense or whether the Court was correct in its various rulings pertaining to prior administrative proceedings, conspiracy to destroy Bridges, or wire-tapping incidents. It is whether the appellant embarked upon the course of conduct described by the Court.

The aggravated nature of appellant's misconduct can be appreciated only by viewing it as a whole, since each act of misbehavior was part and parcel of an overall design or scheme to thwart the Court in its judicial processes. That a contemnor's misconduct may be viewed as a unit rather than as separate isolated acts is apparent from the decision of the Supreme Court in *Clark v. U. S.*, 289 U.S. 1.⁷ There the defendant was convicted of a criminal contempt to obstruct justice by knowingly giving false answers to questions affecting her qualifications as a juror. The Court

⁷Inasmuch as the false character of the answers was not a fact judicially known to the Court, the offense was tried in the manner now provided in Rule 42(b) F.R. Crim. P. and proof was had concerning falsity of the answers.

proceeded on the theory that the defendant's answers on *voir dire* examination were wilfully and corruptly false and that the effect of such misconduct was to hinder and obstruct the trial. The Court, in an unanimous opinion, said, p. 12:

The petitioner blurs the picture when she splits her misconduct into parts, as if each were a separate wrong to be separately punished. What is punished is misconceived unless conceived of as a unit, the abuse of an official relation by concealment and deceit. Some of her acts or none of them may be punishable as crimes. The result is all one as to her responsibility here and now. She has trifled with the Court of which she was a part, and made its processes a mockery. This is contempt, whatever it may be besides.

The same theory underlies *U. S. v. Mine Workers*, 330 U.S. 258, a case involving conviction for a single contempt stemming from a continued misconduct in disobeying an order of the Court for fifteen days. See also *U. S. v. Shipp*, 203 U.S. 563, 572. The same doctrine has been adopted by the Supreme Judicial Court of Massachusetts in *Albano v. Commonwealth*, 315 Mass. 531, 535, 53 N.E. (2d) 690, 692, which involved a series of acts of misconduct in open court and *Berlandi v. Commonwealth*, 314 Mass. 424, 439-442, 445-459; 50 N.E. (2d) 210, 220-221, 228-230, which dealt with a course of misconduct in the presence of the Court but not in open court.

Nothing in the contempt statute nor in the decided cases militates against the theory adopted by the trial Court. Appellant does not appear to challenge it al-

though his argument is confined to the defending the propriety of his individual actions.

B. This Court may rely upon the trial Court's certificate as to the description of appellant's demeanor and manner during the trial.

In dealing with a subject such as contempt this Court is entitled to take into consideration that a printed record of the proceedings cannot convey a complete description of the courtroom atmosphere, nor of the physical actions, timing, gestures and voice inflection of appellant which are apparent not only to the Court but to the jury, counsel and spectators. These are important factors in determining the effect and intent of language and the appellate courts are entitled to rely upon the certification of the presiding judge with respect to such matters. *Fisher v. Pace*, 336 U.S. 155, 161; *U. S. v. Bollenbach*, 125 F. (2d) 458.

What has the trial judge said concerning such matters? He has certified that appellant "was not making an opening statement in any judicial sense, but was using it as a medium and sounding board for dragging in before the jury irrelevant, incompetent and inflammatory matter with the studied and avowed purpose of prejudicing the prosecution in the light of events, incidents and characters having no place in the proceeding before the jury". (Tr. 776.) This was not a characterization later indulged in by the Court to bolster its judgment, for the judge had found it necessary to so advise the appellant during the opening statement in almost the same words. (Tr. 778-779 re-

ferring to Tr. 567.) He refers to a time during the opening statement when it was necessary to tell appellant you are “creating an atmospheric quantity at this stage designed to prejudice and inflame the jury in connection with any sage, considered judgment they may have on the evidentiary matters”. (Tr. 777 referring to Tr. 558.) That appellant’s attitude and misbehavior was physically wearing upon the judge is apparent from the record and indicative of the atmosphere deliberately created by appellant (Tr. 789 referring to Tr. 568.) At that point the Court found it necessary to say “I admonish this jury categorically, unequivocally, with every bit of vigor I have—*which vigor is expending itself in the colloquy with you*—that you are not to read the newspapers (addressing the jury) under any conditions.” At one point in the certificate the Court specifically refers to the strain in the courtroom and says “the Court’s patience was being exacted”. (Tr. 790.) (*Italics supplied.*)

As to Mr. Hallinan’s behavior in cross-examining the witness Garner the Court has certified that on one point “* * * I had reached or was about to reach the extreme ends of my patience”. (Tr. 799-A.) In referring to appellant’s continued questioning concerning wire-tapping in violation of the Court’s repeated rulings that such questions were improper the Court describes his manner of examination. “Mr. Hallinan pounding through again” (Tr. 800); “Mr. Hallinan driving through notwithstanding the objections and the rulings of the Court”. (Tr. 801.) The Court stated succinctly but clearly in the certificate the reasons it

believed appellant's questioning of Garner was not in good faith and said, "*The questions, the manner, the deportment and the decorum* represented, in the opinion of the Court, a studied plan to destroy in advance the effectiveness and the asserted truthfulness of the witness placed upon the stand by the bland assertion that somewhere, sometime, he might have been associated with an alleged conspiracy, which, of course, Mr. Hallinan has referred to as somewhat fantastic". (Tr. 803.) (Italics supplied.) Again appellant's behavior is described by the man best qualified to observe impartially, "Notwithstanding that he again questioned Mr. Garner, driving him now, in the vernacular, with rights and lefts, trying to destroy him, to beat him to the ground, beat him over the head, stab him in the back". (Tr. 805-806.)⁸

These certifications of the trial judge, whose sworn duty it is to be impartial, afford an insight to the tense courtroom atmosphere, the deliberate strain upon the judge engendered by appellant's behavior and his persistent, hard driving, pounding manner in seeking to implant in the jury's mind the idea that certain facts prejudicial to the prosecution were true even though the Court had ruled those matters to be incompetent and irrelevant.

⁸All transcript references in this and the preceding paragraph are to that part of the transcript which was incorporated into the Court's certificate by reference therein.

C. The means by which appellant sought to frustrate the Court in its administration of justice.

On the afternoon of November 17, 1949, the Court undertook to delimit the scope of permissible opening statement by the appellant. At that time appellant had been speaking for some time and the tenor and course of his statement had been revealed. Both appellant and opposing counsel made their views known to the Court, and the Court expressed its views to appellant. In this respect the Court ruled: (1) that the earlier deportation issues were in no wise determinative of the issue at bar (Tr. 513, 516, 531); (2) that Bridges' influence on the waterfront did not affect the ultimate issue at bar (Tr. 516); (3) that to go into the warfare on the waterfront was inflammatory and improper (Tr. 516-517); (4) that matters pertaining to waterfront problems, trade union problems, employer-employee relationships were far divorced from the indictment (Tr. 526-527); (5) that characterization of all prospective witnesses as members of a conspiracy to destroy Bridges was pure speculation and inflammatory and prejudicial. (Tr. 528-529, 534-535.)

The Court consistently adhered to the foregoing rulings and reiterated them during the following days of the trial.

Appellant's conduct on Friday, November 18, and Monday, November 22, is indicative of an intent to obstruct the Court in its administration of justice, and if permitted to continue might be reasonably expected to so undermine the authority of the Court as to make

it impossible to maintain order and direct the trial in the proper legal channels. It is not necessary for appellant's conduct to have caused a complete breakdown of the Court process at any point; it is sufficient if it had a tendency to obstruct. *Conley v. United States*, 59 F. (2d) 929 (C.A. 8); *Froelich v. United States*, 33 F. (2d) 660 (C.A. 8).

The record discloses that appellant set out to use the opening statement as a means of placing before the jury certain historical facts pertaining to the labor movement on the west coast and Hawaii, union warfare and labor troubles of the longshoremen's union, prior accusations against Bridges, previous deportation proceedings, and alleged wire-tapping activities of government agents, although the Court ruled that all those matters had no relevancy to the issue involved in the criminal case on trial. In addition appellant sought to attack the characters of persons he thought might later become witnesses and to convert the statement into an argument on behalf of his client. He adhered to this means of attack after the Court had fully explained its position on the evening of November 17. His discourse went far beyond all reasonable bounds of an opening statement and was calculated to render the jury impotent as an impartial body whose sworn duty it is to receive evidence to the bitter end with an open, unbiased mind. His reiteration of the foregoing matters despite continued objection and endless admonition by the judge constituted defiance of the rulings and authority of the Court. This conduct alone would have justified the Court to

interrupt the trial and punish appellant on Friday. See *Jones v. U. S.*, 151 F. (2d) 289, 290; (app. D.C.). See *Williams v. State*, 19 Okla. Cr. 307, 199 P. 400, 405.

The record discloses that because of that defiance the Court was unable to proceed with dignity and decorum, since it was required frequently to interrupt appellant, admonish him, and caution the jury about the matters to which he had referred. Here was a deliberate, studied disregard of the Court's rulings on the very issues involved in the case, and an attempt to prejudice the jury at the outset of the litigation. Here, as in *Pierce v. United States*, 86 F. (2d) 949, 953 (C.A. 6):

We are not here so much concerned with improper argument springing from the heat and enthusiasm of advocacy, as we are with what appears to have been a studied effort to inject into the case irrelevant and prejudicial matter for the purpose of influencing the verdict, and its continued repetition after adverse rulings. Indulgence was designed rather than inadvertent, and an improper purpose its only explanation.

Perhaps because he had partially succeeded in his endeavor on Friday, appellant continued the same tactics on Monday with increased vigor and with bold disregard for the Court's decision as to the limits of cross-examination. He again took up his cry of the past Friday and sought to cross-examine the witness, not only about matters which the Court had consistently ruled as being immaterial and irrelevant to the issue of his client's guilt or innocence, but also

as to matters concerning which the witness could not possibly have had any personal knowledge. His questions were so framed as to give the jury the impression that certain facts existed and referred to matters not in evidence and not capable of proof under the Court's rulings on the issues. This unworthy effort to get before the jury facts which the trial Court ruled should not be received in evidence at that time was an act of insubordination and a violation of appellant's duty to behave with good fidelity to the Court. Cf. *In re Schofield*, 362 Pa. 201, 66 A (2d) 675.

Moreover, appellant continued his examination in the very teeth of the Court's rulings. Although the Court had consistently ruled that the fact of wire-tapping on past occasions had no bearing on the issues involved and that cross-examination as to such episodes far removed from the period of time involved by the witness' testimony was not permissible, and had found it necessary to admonish appellant that his questions constituted an attempt to evade its ruling, appellant asked five questions in a row pertaining to such alleged activities and so worded them as to impart to the jury the idea that the episodes mentioned had actually occurred.

The continuance of a line of cross-examination after the Court has repeatedly ruled the subject matter to be improper constitutes contempt, particularly where as here, the attorney has been warned that his acts might be so judged. *In re Cary*, 165 Minn. 203, 206 N.W. 402. As was said in *State ex rel. Leftwich v. District Court*, 41 Minn. 42, 42 N.W. 598, 599:

To permit the counsel after the court has decided that a question or a particular course of examination is improper, to persist in renewing substantially the same question, or in continuing that course would incur the danger of the trial becoming a contest of endurance between the court endeavoring to prevent a course of examination that it deemed improper and the counsel endeavoring to follow such a course, notwithstanding the ruling of the court. A counsel who would intentionally attempt such a mode of conducting a trial, especially after being warned by the court to desist, and that it would consider persistence in it a contempt, would undoubtedly be guilty of a contempt.

The foregoing language was quoted with approval by the California District Court of Appeal in a case involving this appellant. See *Ex parte Hallinan*, 126 Cal. App. 121, 14 P. (2d) 797, 801.

Similar misconduct appears with reference to appellant's repeated questioning of the witness about the previous decisions in deportation matters in which Bridges was involved and in attempting to convey to the jury the idea that all the witnesses against Bridges in those proceedings had been found to be liars and perjurers. Appellant frequently returned to these subjects despite the Court's repeated admonitions that his questions related to matters which had been held immaterial and irrelevant and amounted to an attempt to circumvent such rulings. Such attempts to evade the rulings of the Court may be punished

as contempt as appellant well knew. See *Hallinan v. Superior Court*, 74 Cal. App. 427, 240 P. 790, 791.

The facts, therefore, conclusively prove that appellant ignored the rulings of the Court with respect to the materiality of matters on which he sought to base his client's defense and refused to confine himself within the bounds of the issues in the case as defined by the Court. It amounted to a defiant attempt to substitute his own opinions for those of the judge and a deliberate effort to impose his will upon the Court. This manifestly is contempt. *In re Grossman*, 109 Cal. App. 625, 293 P. 683. Such behavior, if permitted in any court of law, can have but one result: the utter breakdown of all the processes of justice and the authority of the law,—in short a demoralization of the courts' authority. It attacks the very pillars and foundations of justice, and any Court would be derelict of its duty if it did not avail itself of its power to compel obedience to its processes. This fact was recognized by the Court of Appeals for the Second Circuit in *United States v. Bollenbach*, 125 F. (2d) 458 (C.A. 2) wherein the Court said, p. 460:

No judge can do his duty, if his power to maintain decorum, and secure his authority from being flouted, is subject to cavil and captious question; he must be able to repress disorders quickly, and, if necessary, ruthlessly; and unless and when he does so he will be free from later question, he cannot effectively deal first hand as he must, with the lawless, the defiant, or the covertly contumacious.

Moreover, appellant's position as an officer of the Court, familiar with the requirements and duties of that office, imposed upon him an obligation at least equal to his obligation to his client to obey the mandates of the Court and uphold its dignity and authority.

A trial counsel, however zealous in his client's behalf, has a paramount obligation to the due administration of justice. Both the court and counsel should be engaged in its due and orderly administration and in maintaining the authority and dignity of the court. Counsel should never try to injure its authority or attempt defiance thereof. *United States v. Landes*, 97 F. (2d) 378, 381 (C.A. 2).

Appellant's contentions that he was seeking to protect his client and therefore was duty bound to raise the issues upon which the Court ruled adversely, is no answer to his misbehavior. While the interests of his client may have prompted him to advance the defense which he was seeking to make, those interests did not require him endlessly to ignore the firm rulings of the Court once the matters in dispute had been decided. The interests of a client quite plainly do not include disobedience to the Court. *United States v. Landes*, 97 F. (2d) 378 (C.A. 2); *Hallinan v. Superior Court*, 74 Cal. App. 420, 427, 240 P. 788, 790 (two cases). Nor is his misconduct excusable on the theory that the Court was incorrect in its decisions. Appellant had the right to object to any adverse ruling in order to preserve it for review, and the record discloses that this was accomplished at an early hour.

Having done so, it was appellant's duty to abide by the determinations of the Court and allow the trial to proceed in an orderly and dignified manner. *State ex rel. Hurley v. District Court*, 76 Mont. 222, 246 P. 250; cf. *In re Mindes*, 88 N.J.L. 117, 95 A. 743; *In re Schofield* (supra).

The trial judge, having observed the conduct of appellant and having exhausted all reasonable means of persuading appellant to confine himself to the issues in the case as determined by the Court, is best qualified to decide whether appellant was contemptuous, and his judgment should not be overturned unless it is clear that he acted in abuse of his discretion. *Miller v. Zaharias*, 168 F. (2d) 1 (C.A. 7); *State ex rel. Leftwich v. District Court* (supra).

III.

THE SUSPENSION OF APPELLANT'S RIGHT TO PRACTICE BEFORE THE DISTRICT COURT.

Although the Court in pronouncing sentence ordered appellant's name stricken from the roll of attorneys of the District Court (Tr. 848) that order was later expressly set aside at the time a stay of execution was granted (Tr. 871) and it was not included in the formal judgment signed by the Court. (R. 50.) Under these circumstances there is nothing here for this court to decide since the record does not affirmatively disclose that appellant has been barred from practice before the District Court. But see *Ex parte Tillinghast*, 4 Pet. 108, 7 L. Ed. 798.

CONCLUSION.

To deny a trial Court sufficient flexibility of power to protect the administration of justice from appellant's odious conduct is to place the Court at the mercy of those who respect "neither the laws enacted for the vindication of public and private rights nor the officers charged with the duty of administering them". (*Ex parte Terry*, 128 U.S. 289, 313.)

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
February 24, 1950.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,

ROBERT B. McMILLAN,
Assistant United States Attorney,
Attorneys for Appellee.

JAMES M. McINERNEY,
Assistant Attorney General of the United States.

JAMES W. KNAPP,
Of Counsel.

No. 12,424

IN THE
United States Court of Appeals
For the Ninth Circuit

VINCENT HALLINAN,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

GEORGE OLSHAUSEN,

280 Union Street, San Francisco 11, California,

ROBERT W. KENNY,

250 North Hope Street, Los Angeles 14, California,

*Attorneys for Appellant
and Petitioner.*

WILLIAM F. CLEARY,

345 Franklin Street, San Francisco 2, California,

Of Counsel.

FILED

JUN 22 1950

PAUL P. O'BRIEN,
CLERK

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APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

I.

PRELIMINARY STATEMENT.

With but one exception, all of the numerous instances of asserted contempt found by the trial Court and affirmed by this Court, consist of instances in which statements made or questions asked by appellant are said to have been made or asked in disregard

and defiance of previous rulings of the trial Court foreclosing appellant from making statements or asking questions of the character actually made or asked.

We will show, in this petition, that in not so much as a single one of the instances of asserted contempt mentioned in this Court's opinion was there a previous ruling foreclosing appellant from making a statement or asking a question of the character held to be contumacious. We will show, also, that only by assembling out of context and in foreshortened form unrelated matters in such a way as to indicate that they are related, and by intermixing therewith opinions of and charges made by the trial Court which are not substantiated by the record and "positions" taken by the prosecutor is any semblance of contumacious conduct made to appear. *We will show, also that a careful reading of this Court's opinion discloses that the above stated things are so.*

The one exception heretofore mentioned is the incident dealt with in the next to the last paragraph on page 6 of the printed opinion. We will show by the record that the remark therein quoted was not made in the hearing of the trial Court and could not have disrupted, or been intended to disrupt, the proceedings in the trial Court.

We will show, also, that the points on which this Court bases its conclusion that there was a lack of good faith on appellant's part are not well taken.

We will, in addition, restate certain points heretofore made and raise certain other points which could

not have been raised prior to the filing of this Court's opinion. The later points are raised in this petition to preserve our right to raise them in the Supreme Court.

II.

THE OPENING STATEMENT.

This Court divides all of the asserted contumacious acts of appellant during the opening statement into four categories, namely: statements relative to labor disputes; attacks upon the credibility and character of anticipated opposing witnesses; asserted wire-tapping and espionage by agents of the government; and the two incidents mentioned at the bottom of page 6 of the printed opinion. We will deal with these in the order selected by the Court.

A. UNION LABOR DISPUTES.

This Court discusses eight separate incidents under this category. We will deal with these in the order selected by this Court. In addition, this Court, in discussing the first of such incidents, makes reference to three previous instances. We will deal with these previous instances in our discussion of the first incident.

THE FIRST INCIDENT.

The first incident of asserted contempt upon the part of the appellant recited by this Court is stated on pages 2 and 3 of the printed opinion as follows:

"The rulings and assertions made during appellant's opening statement contain several lines of thought. For clarity we consider these rulings and assertions separately according to the subjects with which they deal. The first of these subjects is labor union disputes.

"In pronouncing the judgment of contempt the Court states: '*Mr. Hallinan, unbridled again, lapsed into a violation of the orders. At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in on an opening statement and to matters which should not have been brought before the jury.*'* The record pertaining to this incident shows the following:

"In the course of his opening statement appellant stated: 'Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have already observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.' The Court thereupon 'admonished' appellant that 'we are not trying warfare or alleged warfare between any union or any group and the like.' While the certificate makes no reference to prior admonitions the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activities in which

*Emphasis ours throughout unless otherwise noted.

Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the court."

Did appellant in this instance, as charged by the trial Court and impliedly held by this Court, "lapse into a violation of the orders" previously given by the trial Court?

Concerning this matter this Court says:

"While the certificate makes no reference to prior admonitions the record discloses *this* to be the *fourth* time after appellant began his opening statement that the Court had *expressed the opinion* that historical accounts of labor union activities in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the court."

An *expression of opinion* by a trial Court may or may not amount to an order, ruling or admonition. The test is whether what the trial Court says forecloses a litigant from going forward on the subject mentioned by the trial Court. If the *litigant* is not foreclosed, *his attorney* is not foreclosed, for it is through his attorney that a litigant speaks.

In none of the three previous instances mentioned by this Court did the *expression of opinion* of the trial Court amount to an order, ruling or admonition foreclosing *the defendant Bridges* from making further comments in his opening statement on union labor disputes.

A search of the record reveals three and only three previous references by the trial Court to the subject of labor union disputes.

The first of such three previous instances appears on page 499 of the transcript. It reads as follows:

“And without interrupting you unduly, we full well appreciate the genesis behind the labor movement in the United States, as well as in the State of California; and perhaps the waterfront travail that is written large in the history of this city as well as the state. Much of it is now written in granite, probably, in the history of this state. *I cannot see altogether at this juncture,—*I am not interrupting you unduly, *I want to feel the matter out as we go along,—I cannot feel at this juncture* how this historical narrative, however interesting it may be to all of us, would tend to prove or disprove any of the material allegations in this indictment contained.”

A discussion followed in which union labor disputes were not again mentioned and which was closed by this statement at the bottom of page 500 of the transcript:

“The Court. We will take a recess and *you think that over for a few minutes.*” (Emphasis added.)

The expressions by the trial Court, “I cannot see altogether at this juncture”; “I want to feel the matter out as I go along”; “I cannot feel at this juncture” and “you think that over for a few minutes” show not *decision* but **indecision**. There was not only no order, ruling or admonition but the “*opinion ex-*

pressed”, if it can be said to be an opinion expressed, was not positive: it indicated no more than an inclination.

It left the matter open.

Observe that there was no mention of inflammatory matter or of vile epithets in this instance.

The second of such three previous instances commences on page 516 of the transcript. It reads as follows:

“Now, how far you may go in an opening statement concerning the narrative background with respect to Mr. Bridges’ benign influence on the waterfront will not affect the ultimate issue at bar, ‘Did Mr. Bridges swear falsely?’ I full well recognize, many people in this jurisdiction feel that he has had a benign influence on that waterfront; that he has done certain things for the working people there; other people feel directly to the contrary. And I think we had an exposition of that from our jury, in selecting these people. In a very forthright manner. Some said that they were prejudiced, others said that they had an open mind.

“Now, to take us back into the gory days of the bloody warfare on that waterfront and raise matters of hysteria and inflammatory matter before this jury is not going to answer this case, in my humble opinion.”

This statement was made during the course of a discussion, in the absence of the jury, between the Court and counsel which commenced on page 511 and ended on page 540 of the transcript. It was both in

form and nature an argument looking *in the direction of a possible or likely order*, ruling or admonition and not in the form or nature of an order, ruling or admonition *in and of itself*. The expression "is not going to answer this case, in my humble opinion" reveals that this is so.

"* * * is not going to answer this case" is both an ambiguous and argumentative statement. We assume that the trial Court meant by it "is not going to be the *determining factor* in this case." But defense counsel is not limited in an opening statement to the mention of matters which in the "humble opinion" of the trial judge will be *the determining factor* in the case. Moreover, the words "in my humble opinion" are inappropriate for an order, ruling or admonition or for an assertion *intended to be taken for or understood to be* an order, ruling or admonition.

Again the matter was left open.

Note that in this instance the trial Court recognized that there had been gory days of bloody warfare on the waterfront and in effect charged that to mention such matters would be inflammatory and raise hysteria. But it was at the time of those gory days of bloody warfare that Bridges was charged with having become a member of the Communist Party. Such charge could not be proved without taking "us back" to those gory days of bloody warfare.

The third of such three previous instances appears on pages 526 and 527 of the transcript. It reads as follows:

“The Court. I hold, gentlemen, as a matter of law, that **the bulk of** the opening statement thus far is immaterial to any rationalization of the charges at bar. I agree with counsel for the government that matters of interrogation of witnesses may be gone into; certainly impeachment may be indulged in to your heart’s content, Mr. Hallinan. *You may cross examine without limitation on your part.* I believe in latitude on a cross examination. But to have this Court sit while you **dilate upon** matters that pertain to waterfront problems, trade union problems, employer-employee relationships, is to degenerate this case into a hearing far divorced from the indictment which is before me.”

This statement of the trial Court has the *superficial* appearance of being an order, ruling or admonition foreclosing appellant from making further mention of labor union disputes during the remainder of the closing statement. On closer inspection, however, it clearly appears that the trial Court in this statement made two qualifications (probably for the purpose of saving itself from error should this Court on an appeal by the defendant Bridges from a judgment of conviction be of the view that the defendant Bridges had the *legal right*, in his opening statement, to inform the jury that he intended to prove that the charges made against him were false and that they had been fabricated, in part, by disgruntled former members of his own union and by rival union labor leaders in an attempt to “get even with him” or just to “get him”). The two qualifications are the phrases

which we have caused to be printed in bold-face type, namely, **“the bulk of”** and **“dilate upon”**.

The word “bulk”, as used in this connection, means “the greater or principal part; main body; majority”. It does *not* mean the whole or entirety. By the use of the phrase “the bulk of” the trial Court left *unidentified* the portions of the “opening statement thus far” which the trial Court considered to be irrelevant. As a result, the sentence in which the phrase “the bulk of” is contained did not condemn, *either as to the past or as to the future* **any particular** subject matter theretofore mentioned by appellant in the opening statement. More particularly, it did not foreclose appellant, as the attorney for the defendant Bridges, from making further reference *to the subject of labor union disputes*.

The word “dilate” is defined as “*to enlarge in all directions; swell; spread or puff out; distend; expand*”. As a result, the sentence in which the phrase “dilate upon” is contained did not prohibit **all** reference to labor union disputes in the portion of the opening statement still to come, but only such **enlarged, swelled, spread, distended and expanded** reference to that subject as would “degenerate this case into a hearing far divorced from the indictment which is before me”.

In this instance, despite the otherwise positive form of the statement, there was no *definite* order, there was no *definite* ruling, there was no *definite* admonition, there was, *at most*, what this Court calls an “*ex-*

*pressed * * * opinion*” by the trial Court. Because of the two qualifying phrases the defendant Bridges could not successfully claim, *on an appeal by him from a judgment of conviction*, that the trial Court, *by what it said*, foreclosed him from making further mention of labor union disputes in the opening statement. If the defendant Bridges was not so foreclosed, then appellant, the attorney for the defendant Bridges and the only person through whom defendant Bridges could speak, was not so foreclosed.

Again the matter was left open.

Observe that in this instance the comment of the trial Court was made in the absence of the jury and was not directed to any particular statement by appellant. Thus there was no vile epithet or inflammatory matter in this instance.

An examination of these three previous instances reveals that the trial Court’s statement that “Mr. Hallinan, unbridled again, lapsed into a violation of the orders.”, is not only not substantiated by the record, *but that the record shows that there were no previous orders on this subject to be violated.*

From the foregoing we see that when appellant said “Now, Mr. McMillan says that they will bring into this trial certain labor leaders, formerly associates of Mr. Bridges. Unfortunately they will, because the labor movement, as you may have already observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.”,

he did not, as charged by the trial Court and impliedly found by this Court, lapse into a violation of orders previously made by the trial Court. In other words, there were no previous orders to serve as predicate for the finding that the foregoing statement by appellant was contumacious. *Moreover, that there was nothing of an inflammatory nature in that statement is self-evident. Nor were any vile epithets hurled.* In addition, such statement was in direct response to the following statement made by government counsel in the opening statement of the prosecution on page 485 of the transcript:

“We shall show the extreme care and caution which both the defendant Bridges and the Communist Party exercised over the many years of his membership to conceal that fact, even from the rank and file of its own membership. *We will prove it by the positive testimony of men and women who, by reason of their position in certain labor organizations* and by reason of their own position in the Communist Party, are able to testify to and will so testify positively, to the fact that defendant Bridges during the period alleged in the indictment was a member of the Communist Party of the United States.”

We now turn from the three previous instances mentioned by this Court to the first incident, itself, and ask this question:

Did the trial Court in this incident make a ruling of such a character as to foreclose appellant from making further mention of labor union disputes during the opening statement?

The answer to this question is likewise "no!"

So that this will be unmistakably evident, we herewith quote this entire incident as it appears on pages 550 and 551 of the transcript:

"Now, Mr. McMillan says that they will bring into this trial certain labor leaders, former associates of Harry Bridges. Unfortunately they will, because the labor movement, as you may have all observed, at times in its career turns back on itself and rends and destroys itself and engaged in internecine quarrels that destroy its utility.

Mr. McMillan. *If your Honor please, is that a statement of what they expect to prove?*

Mr. Hallinan. Yes, certainly.

Mr. McMillan. *It seems to me that it is an argumentative statement.*

Mr. Hallinan. Oh, it is not. We are entitled to show the quarrels between these labor unions as modifying and explaining the witnesses who take the stand.

The Court. I will interrupt you momentarily, Mr. Hallinan, to admonish the jury and admonish you that we are not trying warfare or alleged warfare between any union or any group and the like. This case involves Mr. Harry Bridges, Mr. Robertson and Mr. Schmidt. Witnesses will be produced here. Now, the general trend of this opening statement is purely speculative, *so far as the Court is concerned*. It appears to be a blanket assertion of an attempt on Mr. Hallinan's part to discredit all the witnesses produced by the Government in one fell swoop. *I am not going to limit you* but, Mr. Hallinan, I say to you again it is not serving any particular purpose to

the Court—*it may to the jury*, but I doubt it—to have these blanket assertions made. I think in the final analysis you should reserve your closing argument to the close of this case, realizing your extreme eloquence. *At the present time, may I suggest that you give an outline of what you have in mind?*”

This Court quotes the trial Court as certifying:

“At page 550 the Court had occasion to sustain an objection interposed by Mr. McMillan to matters that should not have been brought in an opening statement and to matters that should not have been brought before the jury.”

The record as above quoted reveals that Mr. McMillan made no objection (he merely asked a question and made a surmise) and that the trial Court did not sustain any objection.

It is true that the trial Court did admonish the jury and appellant that “we are not trying warfare or alleged warfare between any union or any group or the like” but that was not the sustaining of an objection. Moreover, it did not, either in terms or by implication, say that appellant’s statement made reference “to matters which should not have been brought in an opening statement and the matters which should not have been brought before the jury”, nor did it, either in terms or by implication, foreclose appellant from making further mention of labor union disputes.

That this is so is made unmistakably manifest by the trial Court’s statement (which this Court neglected

to mention) that **"I AM NOT GOING TO LIMIT YOU * * * MR. HALLINAN * * *"**.

The trial Court in the certificate charges, and this Court in its opinion implies, that in this incident the trial Court placed a limitation on appellant. The record *affirmatively* discloses that the trial Court not only did not place a limitation on appellant, *but stated in so many words that it was not going to place a limitation on appellant.*

Even the qualification made by the trial Court (i.e., "but * * * I say to you again it is not serving any *particular* purpose to the Court—*it may to the jury* but I doubt it—* * *") by the word "*particular*" and by the clause "*it may to the jury*" left the matter of labor union disputes open for further mention by the appellant.

That this matter was left open is further revealed by the last sentence of the trial Court's statement in this incident, i.e.: "*At the present time may I suggest that you give an outline of what you have in mind?*"

This statement, in the form of a question, called upon appellant at that time, and in the presence of the jury, to give an outline of his reason for contending that the discussion of labor union disputes was relevant and material and proper in an opening statement.

The record discloses that as soon as the trial Court made that request appellant proceeded to give the

Court an outline and explanation of what he had in mind in that respect. The first two paragraphs of appellant's outline or explanation appear on pages 551 and 552 of the transcript as follows:

"Mr. Hallinan. Very well, Your Honor; but Your Honor has very accurately defined the purpose. Every witness that the prosecution will produce will be impeached in advance by the interest, the motive and his prior conduct to Harry Bridges, and that is all I want to tell the jury. In other words, I want the jury to look at these witnesses as they take the stand and not be deceived, **but reserve judgment** as to whether we will not show those things.

"I suppose if I deceive this jury, or if I say something that I can not prove to the extent that I have promised to prove it, then my credit with the jury and the credit of the entire defense lapses. And I am willing that that should be so. Now, I can't see how I could be more sincere than that. And I will also say this, Your Honor, that if the Reporter takes down the statements that I am making, at the end of this case the jury, yourself and the prosecutors will admit that every word of it has been properly introduced in evidence."

Both the trial Court and counsel for the government allowed this explanation to stand without challenge or comment. Appellant was not forbidden to proceed along the lines indicated by him. On the contrary, he was, by the silence of the Court, by the apparent acquiescence of the Court, given permission to proceed along those lines.

We note that this Court does not directly hold that in this incident the trial Court made an order, ruling or admonition foreclosing appellant from making further mention of labor union disputes. We note that all that this Court directly holds in this respect is that

“* * * the record discloses that *this* is the *fourth* time after appellant began his opening statement that the trial Court **expressed the opinion** that historical accounts of labor union activities in which Bridges had taken part were immaterial, were inflammatory or were far divorced from the indictment before the Court.”

As there is no order, ruling or admonition in this first incident foreclosing appellant from further mention of labor union disputes it follows that this incident cannot correctly be made the predicate for a holding that appellant was guilty of contempt in making further references to that subject in the opening statement.

Note that what appellant said in this incident was not in the least bit inflammatory and that he hurled no vile epithets. Such hurling as was done was done by the trial Court in saying that appellant was trying to destroy all Government witnesses “in one fell swoop”.

SECOND INCIDENT.

The second incident is recited by this Court as follows:

“Subsequently, appellant again began a recital of a history of the growth of the C.I.O., and its expulsion from the A.F.L., which was said to

have been accompanied by charges that the C.I.O. and certain of its leaders, including Bridges, were communistic. This recital was objected to and the objection sustained.”

The record account of this incident, beginning on page 553 and ending on page 554 reads as follows:

“Mr. Hallinan. * * * This source of witnesses that counsel has told you he is going to produce here, comes very close to the matter that I am now going to discuss with you. I have said that a certain company union had existed on the waterfront and was replaced by an American Federation of Labor union, and then the American Federation of Labor assigned a certain committee called the Committee for Industrial Organization under John L. Lewis to organize industries on a total basis. We all know prior to that time most unions were local craft unions, rather loosely amalgamated, and they were not industrial unions. But the new union under the NRA matter, the CIO, the Committee for Industrial Organization, became very active and very successful and finally some difficulty—we won’t inquire into that unless it be considered argumentative—caused the American Federation of Labor to quarrel with the CIO and ultimately to expel them. The CIO was then considered what is called a leftwing organization, democratic, with no discriminations against anybody for race, religious belief or political belief, and it was called by the A. F. of L. Communistic.

And Harry Bridges, who was then an officer of the A. F. of L., was expelled from the Union as Communistic, *because* he encouraged the amalga-

mation of the Longshoremen with the CIO. There again, a great——

Mr. McMillan. May it please your Honor, we are obliged—patience has always been a very predominant feature in my nature, but I can't let these matters go by.

The Court. The objection is sustained." (Emphasis added.)

The statement by appellant had proceeded for six sentences. No objection was made to any of the first five of these sentences. The objection was to the sixth sentence and, it would appear, not to appellant's mention of labor union disputes as such (*and certainly not to appellant's admission that Bridges was expelled from the union as Communistic for such an admission militated in favor of the prosecution and against the defense*) but to appellant's assertion that Bridges was expelled from the union "*because he encouraged the amalgamation of the Longshoremen with the CIO*".

Be it noted that neither the ground nor the scope of Mr. McMillan's objection was stated either in the objection of itself or in the trial Court's ruling. As a result appellant was entitled to assume that the objection was to the last remark, that the ground of the objection was that the remark was argumentative and that the trial Court sustained the objection on that ground and solely on that ground. Certainly appellant was not required to assume that the objection ran to the entire six sentences or to the mention of union labor disputes where there was nothing stated in the objection to so indicate and where the trial Court

just three pages of the transcript preceding the objection had stated, with reference to the subject matter of union labor disputes, that *it was not going to limit appellant.*

Note that there was no inflammatory matter or vile epithets in this incident.

THIRD INCIDENT.

The third incident is recited by this Court as follows:

“The Court, in its certificate, then refers to a long dissertation by appellant concerning ‘some internal warfare between the C.I.O. and the A. F. of L.’ It appears of record that immediately after the sustaining of the above objection, appellant made some statement concerning the affiliation of Bridges’ I.L.W.U. with the C.I.O. and began a further discussion of a Maritime federation of the Pacific. Objection was again made and sustained.”

The record account of this incident beginning on page 554 and ending on page 555 of the transcript is as follows:

“Mr. Hallinan. Getting away from that point of it and coming directly to a witness who will be brought in here, and to two other witnesses who will be the agents of that particular witness, the difficulty as to what master organization these unions would associate with being resolved by the longshoremens, the ILWU, in favor of the Committee for Industrial Organization, by an enormous vote that union left the American Federation of Labor and associated with the Committee

for Industrial Organization. A number of unions along the Pacific Coast engaged in maritime and longshore work had been amalgamated for some years in a federation called the Maritime Federation of the Pacific. The longshore workers' union was the largest of the——

Mr. McMillan. May it please your Honor again, I object to this *historical matter*. I can't for the life of me see at any stage of this case where this *historical situation* would be admissible.

Mr. Hallinan. If counsel would give me five minutes, I will show him in an instant and I will define one of his witnesses for him within the five minutes.

Mr. McMillan. Well, may it please your Honor, the difficulty about this whole matter is, *it is historical and it is argumentative*; it properly belongs in an argument, not an opening statement. *In an opening statement it is not intended to take a **shotgun**——*

The Court. The objection is sustained."

The trial Court's ruling was in response to Mr. McMillan's objection. Mr. McMillan objected that what appellant had just said related to a historical situation, was argumentative and was in the nature of a **shotgun** discharge. The trial Court made no ruling until Mr. McMillan uttered the word "**shotgun**". Being in response to Mr. McMillan's objection, the trial Court's ruling was to the effect that what appellant had just said was *too broad and too general* in character and that appellant should be *more specific*; that he should not spread his shots *as a shotgun does*. Or, to say the least, *that is what appellant had the*

right reasonably to assume the trial Court meant by this ruling. The trial Court may have had in mind a different meaning, a broader meaning. If so, that different and broader meaning was not stated. Appellant, of course, was not bound by the undisclosed thoughts and intentions of the trial Court, he was not required to read the mind of the judge of that Court under sanction that if he failed to read it fully and correctly he would become liable to imprisonment for criminal contempt.

Note that nothing said by appellant was inflammatory or a vile epithet. The epithet hurled in this instance was hurled by Mr. McMillan and consisted of the shotgun reference.

FOURTH INCIDENT.

The fourth incident is recited by this Court as follows:

“Immediately thereafter, *in disregard of the ruling*, appellant continued with the discussion of the Maritime Federation of the Pacific, and its alleged control by Harry Lundeberg, who appellant stated would be a government witness, and to whom he referred in derogatory language. Objection was made and the Court said: ‘What Mr. Hallinan has to say is in reality that type of matter that may be reserved for closing argument, if the facts demonstrate it. * * * I think, Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.’ ”

The record account of this incident beginning on page 555 and ending on page 557 reads as follows:

“Mr. Hallinan. Now, an organization of sailors on the Pacific Coast, a member of the Maritime Federation of the Pacific, was controlled by a man who will appear before you. His name is Harry Lundeberg, one of the most remarkable of the witnesses that will be produced. He is like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas—a man who has been arrested for brawling and assaults in half the courts of the world. Dominating this union with an iron hand, he burned the ballots that were taken——

Mr. McMillan. If your Honor please——

Mr. Hallinan. ——by his union concerning the Federation——

Mr. McMillan. Just one moment.

Mr. Hallinan. Pardon me. You want to talk?

Mr. McMillan. I want to make an objection, Mr. Hallinan. You as a lawyer, with your wide experience, know that you have no such statements to prove in this court.

The Court. This—I again repeat another admonition to the jury, that what Mr. Hallinan has to say is in reality that type of matter that *may* be reserved for closing argument, if the facts demonstrate it. *This wild anticipation of the Government's case is to my mind novel; I have never experienced it before in these courts, and I am naturally indulgent toward counsel on both sides, to the end that this case be heard fairly, impartially and that we have all the evidence before us. But I think, Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.*

Mr. Hallinan. Very well.

Mr. McMillan. May I interrupt, just to give a good example? He has stated Mr. Lundeberg has been arrested in every port——

The Court. I noticed that. I noticed that. All parts of the world. And I will instruct the jury to disregard *that* statement.

Mr. McMillan. Well, the point that I had——

The Court. I was hopeful that we might get into the evidentiary matter, have the case under way. I am not going to foreclose Government counsel or defense counsel from the widest argument at the close of this case. I am not going to foreclose them on time.

Mr. McMillan. Yes.

The Court. I never have. I assure you, Mr. Hallinan, that I will give you ample time, as well as your colleague, Mr. MacInnis, to argue the matter from its fullest picture. But at the present time I say again to you, with the mild degree of patience that I command, that you are going far afield from any opening statement that I have ever heard in this court or any other court.

Mr. McMillan. Your Honor, what I wished to point out definitely is this: Those statements with reference to arrest; now, Mr. Hallinan is a skilled lawyer, and knows that if that witness takes the stand and he seeks to impeach that witness, the only question that he could ask him is, 'Have you ever been convicted of a felony?'

The Court. I understand.

Mr. Hallinan. I don't intend to prove it by that witness; I will prove it by one of your own witnesses. One of his own, his other witnesses."

We observe that this Court says:

“Immediately thereafter, in disregard of the ruling, appellant continued with the discussion of the Maritime Federation of the Pacific * * *”
etc.

Actually, what appellant did was to begin at once to *comply* with the trial Court’s ruling *as appellant understood it*, that is *by becoming specific*, by singling out for comment one of the persons whom he expected to be called as a prosecution witness.

Lundeberg had not only testified against the defendant Bridges in the second deportation proceeding (testifying that Bridges admitted to him that he, Bridges, was a member of the Communist Party) but Lundeberg was the only one of 125 witnesses who had testified against Bridges in one or the other of the two deportation proceedings who had not been thoroughly discredited and their testimony completely rejected by the reviewing officers of the government. [See *Bridges v. Wixon*, 326 U.S. 135, and also the printed record of this Court in the case of *Bridges v. Wixon* before it went to the Supreme Court of the United States.] Appellant, therefore, had every reason to expect that Lundeberg would be called as a prosecution witness in the case then on trial.

Again we say that appellant was trying to *comply* with the trial Court’s ruling by leaving the general and getting to the particular. He did not intend to disregard the previous rulings of the trial Court and he did not *in fact* disregard that ruling, as stated by this Court.

Neither the objection nor the ruling in this incident was directed against the mention of labor union disputes. Both the objection and the ruling were directed to what the trial Court called "these excoriations and vituperative matter" and the extent of the Court's ruling was to say that the trial Court **thought** that such matters had "no place at *the present time*". Again, an *expression of opinion* not amounting to an order.

Note that what appellant said in this instance was to use this Court's words "derogatory language". It was not inflammatory and it did not descend to the level of vile epithets.

FIFTH INCIDENT.

The fifth incident is recited by this Court as follows:

"The certificate recites that only a few seconds or minutes later, appellant again 'launched into the *same* demeanor, same conduct, persistent, studied as it was.' From the record we learn that when appellant resumed his opening statement, his very first sentence had to do with quarrels between Bridges' union and the A.F.L. He went on to charge that Lundeberg and another labor leader were joined in their fight against Bridges and the latter's union by employer groups, goon squads, killers and perjurers. After the statement that certain government officials also joined in this persecution of Bridges, although other 'up-standing, granite-honest' government officials had gone out of their way to protect him, another objection was interposed and sustained."

First, let us comment on the assertion which this Court quotes from the certificate, viz.:

“launched into the same demeanor, same conduct, persistent and studied as it was”

What was the “**same** demeanor”? Search the certificate from one end to the other and there will not be found any description, any word picture, concerning appellant’s demeanor. And search the entire record and there will not be found *any* reference to *any* demeanor of appellant as being improper, boisterous, surly or otherwise unbecoming. Here the trial Court by the word “*same*” is charging by implication, **by innuendo, BY SUGGESTION** that which, *if so*, should have been charged in *direct and unmistakable terms*. And here we find this Court being misled by that suggestion and itself repeating it, *although it finds no substantiation in the record*.

The record shows that appellant resumed his statement about the two-thirds mark on page 557 of the transcript and that he continued talking *without interruption by either Court or counsel* to about the same position on page 560: a matter of three transcript pages and about four minutes of time. It is true that during that period appellant made mention of labor union disputes, but the pertinent things to observe are first, that no objection was made either by government counsel or the Court to what appellant said on that subject and, second, that the next objection, when it came, was directed against a statement by appellant which had *nothing whatever* to do

with the subject of labor union disputes. As is indicated in this Court's opinion, the next objection was to the following statement by appellant appearing on page 560 of the transcript:

“But let me say this right now for the jury, that any mention that is made of the activity of the Government officials in that connection does not mean the United States Government as a whole, or does not mean the majority of the officials or any officials other than the ones designated, because at every juncture of his career, when his safety and his happiness were threatened, some fine, upstanding, granite-honest *American official,—and usually in a high place—*leaned down and lifted Harry Bridges and delivered him from the coils——”

The objection and the ruling were as follows:

“Mr. McMillan. If your Honor please, that is also part of a closing argument. It is purely argumentative.

The Court. Yes, objection sustained.” (Tr. pp. 560-561.)

There is nothing either in this objection or in this ruling which either directly or indirectly relates to the subject of labor union disputes.

In this instance there was no inflammatory matter and no vile epithets as we will show in the all italics paragraph at the end of the 10th incident.

SIXTH INCIDENT.

The sixth incident is recited by this Court as follows:

“Immediately thereafter appellant said, ‘the strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges’ arrest on a deportation inquiry to be issued by the Secretary of Labor.’ Appellant also referred to the passage of a ‘bill of attainder’ against Mr. Bridges by the United States House of Representatives * * *”.

The record pertaining to this incident (Tr. p. 561) is as follows:

“Mr. Hallinan. The strength and extent to which these people were willing to go may be learned from the fact that as early as 1936 they caused a warrant for Mr. Bridges’ arrest on a deportation inquiry to be issued by the Secretary of Labor. The result of that deportation inquiry I am not going to go into, but the fact that one existed is of the utmost importance, and is one of the things that the jury will have to take into consideration in analyzing what the witnesses are saying. And I will presently explain to you why.

The United States House of Representatives passed as against Harry Bridges the only bill of attainder ever passed in the United States, and——

Mr. McMillan. Your Honor, if your Honor, please, that is argumentative. He is not in some conference now.

The Court. Objection sustained.”

It is self-evident that such a statement by appellant made no reference to the subject of labor union disputes and that neither the objection nor the ruling had any relation to that subject.

Note that there was no inflammatory matter and no vile epithets in this instance.

SEVENTH INCIDENT.

The seventh incident is recited by this Court (as a continuation of the sentence in which the reference to the sixth incident is ended) as follows:

“* * * and also stated that ‘Mr. Bridges has made the mistake of not taking the \$50,000 that was offered to him back in 1934 to throw the strike and go back to Australia.’ Again objection was made and again sustained * * *”

The record discloses that this seventh incident occurred on pages 577 and 578 of the transcript (i.e., some 16 transcript pages and approximately twenty minutes in time subsequent to the sixth incident).

The record account of this seventh incident is as follows:

“The Court. You may proceed.

Mr. Hallinan. However, Mr. Bridges has made the mistake of not taking the \$50,000 that was offered to him back in 1934 to throw the strike and go on back to Australia——

Mr. McMillan. That is objected to.

Mr. Hallinan. We will show that.

The Court. The objection is sustained and the jury is instructed to disregard the statement.”

We suppose that the unstated ground of this objection was that the matter stated by appellant was irrelevant and immaterial. The statement did not deal with a union labor dispute as such but with the defendant Bridges' asserted act of refusing an offer of \$50,000 to throw a strike. The ruling was not directed against the mention of union labor disputes.

Again no inflammatory matter and no vile epithets.

EIGHTH INCIDENT.

The eighth and last incident mentioned by this Court under the heading of labor union disputes is stated by this Court as follows:

"* * * and appellant then referred to the labor situation in Hawaii as 'the renewal of about what had happened in San Francisco—poison gas and clubs for the workers * * *'. Again objection was made and again sustained."

The record printing of this eighth incident (Tr. pp. 579-580) is as follows:

"The Court. Proceed.

Mr. Hallinan. The International Longshore Workers Union went down to Hawaii and organized the disorganized and exploited workers there, and they drew down upon themselves and upon Bridges anew the malice, hatred and revenge that has flowered this conspiracy anew of the powerful feudal five companies of the New Hawaii, and that is the immediate cause of what is now confronting us. The situation there was the renewal of about what had happened in San Francisco—

poison gas and clubs for the workers and a storing up of the——

Mr. McMillan. If it please Your Honor,——

Mr. Hallinan. This is not ancient history; this happened within the last year.

Mr. McMillan. The poison gas, rocks, stones——

The Court. The objection is sustained, Mr. McMillan.”

This statement by appellant did relate to a labor union dispute. It was not in disregard or in defiance of any previous ruling of the trial Court, however. The only previous ruling of the trial Court relating to the mention of union labor disputes was, as we have pointed out, the ruling in the third incident and it related, again as we have pointed out, to *general rather than specific* (i.e., **shotgun**) *historical accounts of union labor disputes*.

Note that here there was no inflammatory matter and no vile epithets. That there had been violence in the recent Hawaiian strike was well known.

B. ATTACKS ON CREDIBILITY AND CHARACTER OF OPPOSING WITNESSES.

The Court commences its discussion of this subject with the following statement:

“The next type of matter found in the opening statement consists of direct attacks upon the credibility and character of anticipated opposing witnesses. The Court, in the absence of the jury, stated that *in its opinion* appellant had, in his

opening statement, been 'anticipating much of the Government's case, indulging in speculation on speculation,' and 'creating an atmospheric quantity at this stage designed to prejudice and inflame the jury.' *Reference is made to Government counsel's statement as to the position of the Government. This, the record discloses, was to the effect that appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement.'*

We find in this statement something which to us is strange. Strange to the point of being literally dreadful in its implications. We believe that once we have pointed this thing out, this Court, out of consideration for itself as well as for the law, will want to give this case further consideration before going on permanent record.

What is the strange thing of dreadful implications which we find in the foregoing statement of this Court? We find the trial Court making reference to the "position" taken by government counsel *as a predicate for a summary judgment holding appellant in criminal contempt of Court* and we find this Court making reference to that "position" of the prosecutor *as a predicate for affirming that summary judgment of criminal contempt.*

From what we have read upon the subject we suppose that in a totalitarian country, where no dissent is permitted and the prosecutor speaks with the voice of supreme authority, a defense counsel who did not accede to and follow a "position" taken by the prose-

cutor would be summarily imprisoned for criminal contempt. But we had no idea that any trial Court in our land would consider such an action contempt of Court, much less criminal contempt of Court, or that any Appellate Court in our land would base an affirmance in a summary judgment of criminal contempt, either in whole or in **ANY** part, upon the charge that defense counsel in a criminal case had failed to follow a "position" taken by the prosecuting attorney **concerning how the case of the defendant should be presented.**

Is the former not precisely what the trial Court has done in this case? And is the latter not precisely what this Court is **doing** in this case? What relevance or materiality **could** the reference to the "position" taken by the prosecutor have, either in the trial Court's certificate or in this Court's opinion, *except to serve as a predicate for the judgment?*

It should be observed that neither in the certificate of the trial Court nor in the statement of this Court is it said that the "position" so taken by the prosecutor was adopted by the trial Court, that is converted by the trial Court into a ruling. The record discloses that the trial Court did not, either directly or by implication, adopt the "position" so taken by the prosecutor. Indeed, in the *first* statement made by the trial Court *after* the prosecutor had stated his "position" (the position being stated by the prosecutor on page 530 of the transcript and the following statement by the Court being made on pages 530 and 531 of the transcript) the trial Court said, addressing appellant:

“I of course am at a loss presently to indicate to you how we may delimit your presentation at this time”.*

In other words, one of the acts of contempt *certified* by the trial Court and *accepted* by this Court *upon which the judgment is made to rest* is an act of appellant in not acquiescing in and following a “position” *taken by the prosecutor which was not made a ruling of the trial Court.*

We find in the foregoing statement of this Court another thing which to us has dreadful implications.

The trial Court would not have made reference to the “position” taken by the prosecutor nor would this Court have stated the “position” taken by the prosecutor had not the trial Court and this Court severally been of the view that such “position” was legally sound. That “position” was not and is not legally sound. *It runs counter to the fundamental principles of our American system of justice.* And that this is so is subject to demonstration.

Every prosecuting attorney, at the commencement of a criminal trial, makes an opening statement. In making that opening statement he says things *which attack the credibility and character* of the defendant, or of the defendants, as the case may be. *This is necessarily so.* **He could not make an opening statement without so doing.**

*The trial Court, in the certificate, made reference to but did not quote this statement. Compare Transcript pages 531 and 778. This Court makes no reference to this statement.

In this case the prosecuting attorney in his opening statement told the jury that he would prove that the defendant Bridges was a member of the Communist Party, that he had committed perjury, that he had defrauded the government and that he had conspired with the other two defendants and with "divers persons to the Grand Jury unknown" to commit perjury and to defraud the government. The prosecuting attorney also told the jury in that opening statement that he would prove that each of the other two defendants was a member of the Communist Party, had conspired with the defendant Bridges to commit perjury and to defraud the government and had aided and abetted the defendant Bridges in committing perjury and in defrauding the government. In so doing the prosecuting attorney *attacked the credibility and character of each of the three defendants* and, by the expression "divers persons to the Grand Jury unknown," of **every** person the defendants **possibly** could call to controvert *directly* (as distinguished from circumstantially) the witnesses whom the prosecution would call to establish the offenses charged against the three defendants.

We do not complain of this. That was the prosecuting attorney's legal right.

But the law of our land gives to the prosecutor no greater breadth or depth or scope in the making of an opening statement *than it gives to the defense*. Our system of justice **leans** in such matters not in favor of the prosecution *but in favor of the defense*. It

does so in the presumption of innocence, in the doctrine of reasonable doubt, in the allowance of more peremptory challenges to the defense than to the prosecution and in the right of appeal to the defendant on conviction but not to the prosecution on acquittal. It does so in many other ways. In not *one single way* does it give to the prosecution a greater leeway.

Yet is the opposite of this not precisely what the prosecutor contended by taking the "position" that "appellant was not entitled to attack the credibility of prosecution witnesses in the opening statement"? *And is the opposite of this not precisely what the trial Court by necessary implication held when it made reference to that "position" of the prosecutor as a predicate for judging appellant guilty of criminal contempt?* **And is the opposite of this not precisely what this Court by necessary implication holds when it states that "position" of the prosecutor and uses it as predicate for upholding appellant's conviction?**

We will say in all sincerity that by reason of the statement of this Court which we have just discussed, if the present opinion of this Court is allowed to become the decision of this Court and if the Supreme Court of the United States by reason of the haste which it must exercise in passing on petitions for certiorari refuse to grant certiorari a *dangerous, repressive* and **UNAMERICAN** precedent will have been set which, if followed, *will lead to the destruction of our cherished system and concept of justice.*

Concluding our comment on the above statement of this Court, we again call attention to the fact that there was no ruling of the trial Court foreclosing appellant upon resuming the opening statement from attacking the credibility and character of anticipated opposing witnesses. There was only the "position" taken by the prosecutor to serve as a predicate for a finding of contempt, should appellant make such an attack.

NINTH INCIDENT.

We now proceed to the first incident under this heading mentioned by this Court. We will call it the "Ninth Incident" for the purpose of easy reference and to avoid confusion. It is stated by this Court as follows:

"Appellant then resumed his opening statement. We learn from the record and certificate that appellant referred to Harry Lundeberg as 'one of the most remarkable of the witnesses that will be produced,' 'like a character from Jack London, a typical bucko mate, with a reputation for violence and ferocity as wide as the Seven Seas, a man who has been arrested for brawling and assaults in half the courts of the world.' Objection was again made and the Court stated: 'This wild anticipation of the Government's case is to my mind novel,' and ruled that 'these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time.' The Court also specifically instructed the jury to disregard the statements about Lundeberg's arrests in all parts of the world."

We have hereinbefore quoted the record concerning this incident under the Fourth Incident, *supra*, pages 23-24.

In this incident did the trial Court make a ruling foreclosing appellant from making further attacks upon the credibility and character of anticipated opposing witnesses? It did not. It did what in other instances this Court has called "expressed * * * opinion". That this is so, is revealed by the following excerpt from the trial Court's statement, giving particular attention to the words printed in italics:

"The Court. This—I again repeat another admonition to the jury, that what Mr. Hallinan has to say is in reality that type of matter, that *may* be reserved for closing argument, if the facts demonstrate it. This wild anticipation of the Government's case is *to my mind* novel; I have never experienced it before in these courts, and *I am naturally indulgent toward counsel on both Sides* to the end that this case be heard fairly, impartially and that we have all the evidence before us. But *I think*, Mr. Hallinan, that these excoriations and vituperative matter bearing upon Mr. Lundeberg and others has no place at the present time."

It should be observed further that the only portion of appellant's statement which the trial Court instructed the jury to disregard was that part about Lundeberg's having been arrested in various parts of the world. The following excerpt from the record will reveal that this is so:

“Mr. McMillan. May I interrupt, just to give a good example? He has stated Mr. Lundeberg has been arrested in every port——

The Court. I noticed that. I noticed that. All parts of the world. And I will instruct the jury to disregard the statement.”

In this incident nothing inflammatory, nothing calculated or likely to rise the passions of the jury, was said by appellant. What appellant said about Lundeberg was, as this Court said in its comment under the fourth incident, “derogatory”. But referring to Lundeberg as like a character from Jack London fell far short of being a “vile epithet”. The reference to his having a reputation for violence and ferocity as wide as the seven seas and of having been arrested for brawling and assaults in half the ports of the world was, obviously, a hyperbole, was obviously, a poetic or rhetorical overstatement; like the statement “I am so hungry I could eat a horse, hides, hoof and all”. But the general characterization which appellant gave of Lundeberg was capable of being proved, capable of being seen by the jury to be true not only as the result of the testimony of other witnesses but through examination and cross-examination and the demeanor on the witness stand of Lundeberg, himself.

TENTH INCIDENT.

The next incident is stated by this Court as follows:

“Only a few seconds later, appellant ‘launched into the the same demeanor, same conduct, persistent, studied as it was’. The subsequent state-

ments included assertions that the defense would prove that Lundeberg and another labor leader employed a known murderer to kill Bridges and did in fact send a man to New Orleans who killed a C.I.O. organizer there. Appellant also asserted that the labor leaders had under their control goon squads, killers and perjurers."

Court is referring to the middle portion of the statement by appellant commencing at about the two-thirds mark on page 557 and ending at about the two-thirds mark on page 560 of the transcript which we discussed under the Fifth Incident. As we pointed out in that discussion, the matters to which this Court now refers were not objected to either by Government counsel or by the trial Court. Such remarks, therefore, could have constituted contempt only had there been a previous order by the trial Court foreclosing appellant from making statements of this kind. As we have shown, the trial Court had not previously made any such order. And this incident could serve as the predicate for subsequent contempt only if this incident contained such an order. It does not. It does not contain even so much as an "expressed opinion" by the trial Court.

The statement of appellant here quoted by this Court is factually true. That some labor leaders do have "goon squads" under their control is a matter of common knowledge. That at times murder and attempted murder is resorted to in inter-union conflicts is exemplified by the assaults which have been made upon the Reuther brothers. That there is a gangster

element within the ranks of organized labor which resorts to violence, blackmail, extortion and perjury is exemplified in the publicly revealed history of Browne and Bioff in the moving picture industry. Here appellant was not hurling vile epithets, he was stating facts which he was prepared to prove, in part circumstantially and in part by direct evidence. It so happened that defendant Robertson was a victim of one of the "goon squads" mentioned, that he was beaten up and his back nearly broken in New Orleans, and that another CIO organizer was killed by such a "goon squad" in New Orleans.

ELEVENTH INCIDENT.

The next incident is stated by this Court as follows:

"Appellant further stated: 'Now, as early as 1936 there had been introduced into Harry Bridges' union and into his personal office as his private secretary a woman employed by the Waterfront Employers Association, and she was also the mistress of Mr. Harry Lundeborg.' Objection was made and appellant gave as justification for the statement his purpose of showing Bridges' consciousness of being watched by agents of his enemies, who would use against him any detected activities in the Communist Party. The Court then said, among other things, that an opening statement was not a sounding board for giving vent to immaterial matters, and that it was very unfair to make such a reference to the woman."

This statement is accurate except in one particular. The trial Court did not say "That it was very unfair

to make such a reference to the woman''. What the trial Court did say in this respect was, "I *think* it rather an extreme situation that reference be made to this woman at this juncture without evidence before the Court or jury''. (Transcript page 567.) Moreover, the trial Court did not sustain the prosecutor's objection or admonish the jury to disregard appellant's statement.

The only objectionable matter here is the reference to the unnamed woman having been a *mistress* of Lundeborg. That statement may have been in bad taste. But as far as being inflammatory is concerned *it was much more likely to have incensed the jury against appellant and his client* than to have aroused the passions of the jury against the prosecution or the prosecution's case. The word "*mistress*" was not used for the purpose of moral censure but to name *a relationship*. It had a direct bearing upon the credibility of several prospective prosecution witnesses. Moreover, at the trial it developed that that woman was discharged by Bridges. He testified that it was because it was discovered that she was spying against the union, revealing to the enemies of the union and adversaries of the union confidential union affairs. The prosecution contended, through several witnesses, that she was discharged as a matter of Communist Party discipline. The word "*mistress*" was not used as an epithet *but to name a relationship*.

TWELFTH INCIDENT.

The next incident is stated by this Court as follows:

“After some discussion, the Court stated to appellant: ‘You characterized all of these witnesses as perjurers, low people, characterized them with vile, vituperative terms. 125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now *I think* it highly unfair to this court, indulgent as I have been with you, to continue on that line or that particular vein.’ ”

The record concerning this incident is as follows:

“Mr. Hallinan (addressing the Court), * * * Now, they said that they would show that in conformity with Communist Party plans of keeping secret the membership of persons prominently identified, that membership cards issued to the defendant were issued in the name of Harry Bridges, that he was some kind of a secret, hidden conspiratorial sort of member; that he was elected under some sort of secret and guilty idea. Now, they can come out and say that in an opening statement and try to blacken these gentlemen before anything starts. But because we mention some woman, without revealing her name at all, but who we suppose and expect is going to be a witness here, and who, if we haven’t—

The Court. No. Now, Mr. Hallinan,—

Mr. Hallinan. We will produce the evidence on it.

The Court. Mr. Hallinan, let us pause momentarily and analyze just what we say. You characterized wholesale all of these witnesses as per-

jurers, low people, characterized them with vile, vituperative terms. 125 in number. I do not know at the present time the identity of any witness about to be called for the United States Government, and I dare say that in large part you do not. Now, *I think* it highly unfair to this Court, indulgent as I have been with you, to continue on that line or that particular vein.” (Transcript pp. 568, 569.)

The trial Court’s reference to 125 persons related not to something which had just been said by appellant. The most recent mention of this 125 had been made not by appellant, but by the Court, on the preceding day, and more particularly, on page 533 of the transcript. Consequently, this is not an incident (of contempt) at all, but only a statement by the trial Court, and that statement was not an order; *it was the expression of an opinion*, as the words “I think” reveal.

Here there were no statements by appellant against anyone. Nor was there anything inflammatory said.

THIRTEENTH INCIDENT.

The next incident is stated by this Court as follows:

“The certificate quotes a subsequent statement by the Court, ‘again responding to an objection urged by Mr. McMillan, and to matters that were incompetent and irrelevant’. It is shown by the record that these matters were specific references to three named individuals who appellant asserted were ex-Communists and would be Government witnesses. Each of the references also included derogatory remarks. The Court then remarked:

‘What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this court of the general characterizations and vituperations.’ The record shows that this remark of the Court was made the basis of a ruling. Appellant replied: ‘All right, and that is just what I say, your Honor.’ The Court answered: ‘That procedure * * * has never been the procedure in the federal courts. I sustain the objection.’ ”

The record concerning this incident (Transcript pages 473 and 474) is as follows:

“Mr. Hallinan. Then let us get to the next category and root of their false and fraudulent charge, and I hope that these gentlemen are not entitled to the instant protection that Mr. McMillan affords the government agents. They will produce here, they tell us, ex-members of the Communist Party who will testify to certain things. And there are such witnesses. The most fantastic of all that will be produced, to name a few of them, they have Benjamin Kiplau, who occupied most of his life as a labor spy. There was Manning Johnson, a negro, who was raised by the Communist Party from a cafeteria busboy to some sort of organizer and is now qualified as a government witness. There is Louis Budenz who deserted a somewhat impecunious position on a Communist newspaper and returned or went into the Roman Catholic Church and is now——

Mr. McMillan. Just a moment.

Mr. Hallinan. We are entitled to talk about these people, Your Honor.

Mr. McMillan. There was nothing said in our opening statement as to who the witnesses will be.

Mr. Hallinan. I know who they are. They produced some of these people before the Grand Jury. We are entitled to discuss them and warn the jury what is coming, to inform them, to have them look at them with inquisitive eyes. We do not have to keep quiet about every witness that they are going to put on. If we had such a witness that they knew of, they could characterize him, tell about his testimony, why he would be biased or motivated. That goes right to the credibility of the witness. We can test all of that on cross-examination. I think if anything is proper on an opening statement, that is. All they want to do, Judge, is sort of write out an opening statement for the defense and say 'You can say this and no further.'

The Court. What you propose to do is perfectly plain to me, Mr. Hallinan, and that is to assassinate in advance every witness who might take this stand without any evidence before this Court of the general characterizations and vituperations.

Mr. Hallinan. All right, and that is just what I say, Your Honor.

The Court. That procedure may be extant or it may be the procedure in some other courts. It has never been the procedure in the federal courts. I sustain the objection.

Mr. Hallinan. I will have to enter an exception."

It will be observed that the objection "there is nothing said in the opening statement who the

witnesses would be''. In other words the objection was to the naming of particular persons and prospective witnesses. (Of the three named, Manning Johnson became a witness at the trial, and Louis Budenz was a witness before the Grand Jury.) The trial Court's ruling was limited to that objection, for what the trial Court said was "I sustain *the* objection".

There was nothing inflammatory in the above statement of appellant and there were no vile epithets hurled. Gitlow had been a labor spy. Manning Johnson was a negro, had been a bus-boy, had become an organizer of the Communist Party and at the time of trial was a government witness. Louis Budenz had left the Communist Party and joined or rejoined the Roman Catholic Church. Is this Court of the opinion that the charge that Budenz had left or deserted the Communist Party and became a member of the Roman Catholic Church is a vile epithet?

FOURTEENTH INCIDENT.

The next and last incident discussed by this Court under the category of attacks upon the prospective witnesses, is stated by this Court as follows:

"Later in the certificate reference is made to another objection. The record discloses the objectionable statements to have constituted a wholesale attack on 125 persons who appellant asserted would testify for the Government. Appellant accused them of traveling 'any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers

there, willing to say anything that would bring them a few dollars * * * for fame or what they call fame * * *. They are perjurers of the worst kind * * * spies, turncoats, the very swill of humanity * * *”

The record concerning this incident (Transcript pages 580 to 582) states:

“Mr. Hallinan. The agents of those organizations stirred up anew the conspiracy, revived it, revitalized it, and now, four years after Harry Bridges swore under oath in the Superior Court that he was not and never had been a member of the Communist Party, a perjury charge comes on for trial before you ladies and gentlemen, and we will show by the witnesses for the prosecution that the express and avowed reason for the institution of that was to break the strike in Hawaii, and so said Tom Clark publicly, the Attorney General of the United States, and we will show you that that was the exact and only purpose of fomenting this persecution.

My opening statement has been criticized by admirable judges. The trial procedure may invoke criticism by jurors and even spectators. The sources of inquiry here cover a period of many years. Whether it sounds fantastic or not, there were 125 witnesses. The preparation for the proper trial of such case would consume months. The testimony of all people in previous matters must be read over. I assume, Your Honor, that I should not mention any decision of any court no matter how relevant I consider it to be. I am not going to transgress on your patience.

The Court. We have already discussed those matters at length, Mr. Hallinan.

Mr. Hallinan. These 125 people have testified under oath in numerous matters. The so-called ex-members of the Communist Party have run from New York to Hawaii to San Francisco to Louisiana—any place where they could pick up a few honest dollars of government treasury compensation testifying against Communists here, labor leaders here, school teachers there, willing to say anything that would bring them a few dollars typical of the kind of people that come up in circumstances and periods such as we are going through, now ready for a few dollars, for fame or what they call fame, to keep themselves in the limelight, to swear any man's life away for a hundred dollars. They are perjurers of the worst kind—one of them who will come and hear the very tightest oaths of the Communist Party the very soul of this sort of thing, hired informers, spies, turncoats, the very swill of humanity, these ex-Communists, experts who have now turned upon their old comrades and associations, and finding the pickings more profitable in the safe environment of the government's protectorate, will come in here and swear any man's life away whether they ever saw him before or not."

There was no objection and/or ruling in or to this incident.

The only thing resembling an epithet here is the expression "the very swill of humanity". Standing alone, without the direct statements which precede it, it would be an epithet, but following these direct statements it is not so much of an epithet as it was a summing up in a general term the direct statements

which precede it. Is not the bearing of false witness for hire one of the lowest and dirtiest things a human being can do? Is not perfidy, the betrayal of one's friends for hire a low and dirty thing? At the trial of this case one such witness for the prosecution, on being cornered on cross-examination, openly confessed that on direct examination he had lied concerning the land of his birth, his name, his family, the places where he had lived, the schools which he had attended and his occupation at various times. Another such witness admitted having committed perjury on two separate occasions and each time with respect to a number of different facts and was trapped in the commission of perjury while on the witness stand. Two other such witnesses, including Manning Johnson, testified that Bridges was in New York City taking a bow before a Communist convention and being elected to and inducted in high office in the Communist Party at a time that it was conclusively proven that Bridges was in Stockton, California, addressing a union meeting and attending a night club. Another government witness admitted that he might have committed perjury on a previous occasion. All of these witnesses were admittedly former labor leaders and former members of the Communist Party. One of them admitted that he had received \$5,000.00 from the government in a period of ten months for acting as an expert. Others testified to receiving lesser amounts as expert witness fees. Appellant was not exaggerating when, in this fourteenth incident, he described the character of the witnesses whom the prosecution would call.

C. ESPIONAGE AND WIRE-TAPPING BY AGENTS
OF THE GOVERNMENT.

The next two paragraphs of this Court's opinion read as follows:

"Another subject of rulings and statements was the asserted wire-tapping and 'espionage' activities of Government agents against Bridges. Appellant stated that in Seattle in 1937, 'agents of the Immigration Department dictographed his (Bridges') hotel room and tapped his telephone wire.' The Court interrupted and the prosecutor, upon inquiry from the Court, renewed his assurance that no illegally obtained evidence would be introduced. The Court then ruled as follows: 'The objection is sustained, the jury is admonished to disregard the statement of any kind, character or description, bearing upon that matter.'

"Appellant made a subsequent reference to espionage activities of the F.B.I. against Bridges. Objection was again made and again sustained. Almost immediately after the sustaining of the objection appellant referred to 'the boyish workings of the F.B.I.' and stated that the defense would prove that scores of F.B.I. agents had for years been following Bridges, interviewing and threatening his friends and associates, trying to build up a case."

We have no quarrel with what this Court *actually says* in these two paragraphs. Our objection is to the unwarranted and unmistakable implication given by bringing these two paragraphs together in such a way as to indicate that they relate to the same subject

matter, that is, that the ruling mentioned in the first of these two paragraphs foreclosed appellant from making the statements attributed to him in the second of these two paragraphs.

The record pertaining to the matter mentioned in the first of these two paragraphs (Tr. pp. 565-566) is as follows:

“The Court. * * * There is no question involved in this case of wire-tapping. I take it from assurances given to me on the motion to dismiss, there will be no effort made on the part of the Government to introduce any evidence as a result of any unlawful enterprise?

Mr. Donohue. I renew that assurance.

The Court. You renew that assurance?

Mr. Donohue. Yes, your Honor.

The Court. The objection is sustained, the jury is admonished to disregard the statement, of any kind, character or description, bearing upon that matter.”

It should be observed that this ruling related to the matter of wire-tapping and (other) illegal activities on the part of government agents.

The record pertaining to the matter mentioned in the second of these two paragraphs (Tr. pp. 571-573) is as follows:

“Mr. Hallinan. The motives of the witnesses who will testify, whether they are Communists, ex-Communists, rival union leaders or government agents, are equally open to inquiry by the jury. Bridges was possessed of a faculty that may do him more harm in these matters than all

his serious philosophy. In the year 1941 a convention was held in New York City and the espionage activities of the Federal Bureau of Investigation witnesses reached ridiculous proportions, that is to say, there were four or five men constantly following him. If he went into a hotel lobby, a young man would be looking through a hole cut in newspaper.

Mr. McMillan. I object to that.

The Court. Sustained."

* * * * *

"Mr. Hallinan. This is all proper, your Honor, I submit. Can't we show the activities and motives of the witnesses who are agents of the government? Are they exempt?

The Court. I do not know that they are being produced. The matter at this stage of the proceedings is irrelevant and immaterial, and I sustain the objection, Mr. Hallinan.

Mr. McMillan. We do not even know that he is going to bring in that newspaper.

Mr. Hallinan. Ridicule is a very dangerous instrument. People's pride is a sensitive part of their organization. Harry Bridges gave two articles, one to a New York newspaper and the other to a magazine, the New Yorker, which in 1941 described all the boyish workings of the FBI in this case, and excited thereby additional hatred for him in the ranks of an organization that, of course, takes itself seriously.

Mr. McMillan. If Your Honor please, we are obliged to object again. The newspaper articles that he speaks of would be self-serving as legal proposition.

Mr. Hallinan. Your Honor, it all goes to show the knowledge of the espionage and furthermore, the giving of an amusing article——

The Court. Is it your present theory that the FBI were part and parcel of this conspiracy?

Mr. Hallinan. I will say so. We will show that scores of them have for years been following this man interviewing his clients, his friends, berating witnesses, threatening them, doing all sorts of things, trying to build up a case.

The Court. You reserve your comment concerning them until you finish your cross-examination and argue the matter to the jury. At this time it is irrelevant and immaterial.”

It should be observed that in the statements of appellant just quoted that not one mention is made of wire-tapping or of other illegal activity on the part of anyone. The statement related to espionage and more particularly those forms of espionage known as surveillance and the questioning of persons.

Observe further that in the second of the two quotations from the record the *objection sustained* was to appellant's remark concerning what the F.B.I. had done; that the next statement of appellant related to two articles by the defendant Bridges ridiculing the F.B.I., [a quite different subject because it related to the probable animus of the F.B.I. toward Bridges because of those articles] and that the third comment of appellant *which this Court mentions in such a way as to imply that it was an act of contempt was made by appellant in direct response to the trial Court's*

question: "Is it your present theory that the F.B.I. were part and parcel of this conspiracy?"

In other words, in this last instance, this Court is holding that appellant was guilty of criminal contempt for answering a question asked him by the trial Court, the answer, itself, being confined to the subject stated in the trial Court's question.

Is this not "lifting by the bootstraps", i.e., a straining to find contumacious conduct where none in fact exists?

It should be observed that nothing said by appellant in relation to espionage and wire-tapping by agents of the government was in the nature of a vile epithet or of an epithet at all. And that nothing said by him in that connection was in the least bit inflammatory.

D. THE TWO INCIDENTS MENTIONED AT THE BOTTOM OF PAGE 6 OF THE OPINION.

FIFTEENTH INCIDENT.

This Court continues as follows:

"Two incidents occurred during arguments addressed to the trial Court which it deemed contumacious. Appellant referred to the fact that he had only three weeks to prepare. The Court asked him if he did not have the assistance of associate counsel. Appellant replied: 'Yes—who made the motions that your Honor treated with contempt.'"

The comment of appellant which this Court quotes appears on page 532 of the transcript. On page 520

of the transcript the trial Court characterized the motions made by previous counsel in language indicating that he thought them contemptible or ridiculous. We have reference to the following statement by the trial Court:

“The gentlemen preceding you argued entrapment, that the Government entrapped Mr. Bridges into this alleged false swearing—upon what theory entrapment rested I do not know. It was a novel thing for me to hear”.

But this is not our main answer to this assignment. The record clearly discloses that the only part of appellant’s statement which the trial Court heard was the word “yes” and that the trial Court did not hear appellant say “who made the motions that your Honor treated with contempt”. Our authority for this statement appears on page 778 of the transcript. In making the oral assignment of contempt, the trial Court on that page said:

“At page 532, again counsel, Court—Court, counsel comments. Mr. Hallinan referred to the fact that he had only three weeks to prepare.

The Court. You have the benefit, of course, of an associate counsel—the old firm no doubt are helping a little bit?

Mr. Hallinan. Yes——

(this was in an undertone, a sort of an aside or stage whisper, but the reporter captured it.)

Mr. Hallinan. Yes—who made the motions that Your Honor treated with contempt.”

Had appellant’s remark been made in a voice volume loud enough for the trial Court to have heard it,

there would have been no occasion for the trial Court to have commented upon the fact that the "reporter captured" such statement. In other words, *it affirmatively appears from what the trial Court, itself, said that such comment by appellant was not made in the hearing of the Court and therefore did not constitute contempt punishable under Rule 42(a).*

Here there is not even the charge that what appellant said was inflammatory or that it constituted a vile epithet.

SIXTEENTH INCIDENT.

This Court continues:

"Appellant referred to headlines in newspapers which the trial Court characterized as 'again transcending, bridging, the orders made by the Court with reference to news articles.' In this connection appellant said: 'Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Bridges was a member of the Communist Party but had been elected to high office in it?' "

The record concerning this incident (Tr. pp. 567-568) is as follows:

"Mr. Hallinan. Did your Honor see the headlines in today's papers, which said that the Government was going to prove not only that Harry Bridges was a member of the Communist Party but had been elected to high office in it? What concern was there made for reservation——

Mr. McMillan. Your Honor has instructed the jury not to read the papers.

The Court. Mr. Hallinan, am I entirely obtuse in the trial of this case? Or have we descended into another strata of judicial process? I admonished this jury categorically, unequivocally, and with every bit of vigor that I have,—which vigor is expending itself in colloquy with you—that you are not to read the newspapers (addressing the jury) under any conditions. And this Court, mindful of the admonitions to you, does not indulge himself in the reading of the newspapers. Now, Mr. Hallinan indirectly has given you part of what the headlines are, which in a direct reflection upon this Court's admonition to you.

Mr. Hallinan,——

Mr. Hallinan. Your Honor, all the paper did was repeat what counsel said to the jury yesterday. Now, they said that they would show that in conformity with Communist Party plans of keeping secret the membership of persons prominently identified, that membership cards issued to the defendant were issued in the name of Harry Bridges, that he was some kind of a secret, hidden conspiratorial sort of member; that he was elected under some sort of secret and guilty idea."

From this it affirmatively appears that appellant in making reference to the newspapers had brought to the jury's attention nothing which had not been contained in the opening statement of the prosecution. Certainly this did not constitute criminal contempt or contempt of any character.

It should be observed that nothing inflammatory and that nothing in the nature of an epithet is contained in anything said by appellant in this incident.

III.

THE MATTER OF GOOD FAITH.

This Court next considers the matter of appellant's good faith or lack of it in making his opening statement. This Court commenced this discussion as follows:

“It is appellant's contention that in his opening statement ‘he tried to tell the jury *first* that he expected to show government witnesses to be *liars, perjurers and low characters, who had conspired to give false testimony against Bridges. Second*, that the motives for giving such false testimony were to be found in hatreds engendered by labor disputes in which Bridges had taken part. *Third*, that some of the witnesses had appeared in proceedings to deport Bridges’, and that the matters referred to constituted a valid defense. We are unable to view the statements and conduct of appellant *in such a mild and diluted form. It is true that counsel might properly inform the jury in a temperate manner that he intended to impeach the veracity and character of opposing witnesses by the introduction of competent impeaching evidence.* Appellant did no such thing, however. *The most abusive language used and the vilest characterizations made were not in the form of a statement of what was expected to be proved but a direct statement by appellant of his opinion of the witnesses.* No other motive can be attributed to such statements and conduct than that appellant deliberately sought to inflame the minds of the jurors and unduly prejudice them in advance of the appearance of any witness in the witness chair. Appellant complains that the opening statement was continually interrupted by

government attorneys. We think properly so. *Objections were interposed by counsel and rulings made by the Court, which were disregarded.* Justification for such conduct is attempted to be made upon the ground that the matters stated constituted a valid defense. *(Counsel's opinion of the character of witnesses who he thought might be called was not evidence.* He could not validly say that he would prove the statements made because *no witness would be permitted to hurl the epithets* which seemed to flow from the mouth of appellant with such ease and facility.” (Emphasis added.)

Observe that this Court concedes that the charge that Government witnesses would be “*liars, perjurers and low characters*” would be “in a *mild and diluted form*”.

A. CONCERNING VILE EPITHETS, ETC.

This Court will recall that Lewis Carrol had one of his characters in *Alice in Wonderland* say:

“Say a thing three times and it’s true.”

There is no doubt but that the trial Court repeated over and over again the charge that appellant was using abusive and inflammatory language, was making vile characterizations, was hurling vile epithets, was using vile and vituperative terms and the like. But the mere charging of such things, *no matter how often repeated*, does not make such things so.

Incident by incident, in the order selected by this Court, and in paragraphs printed, except for empha-

sized words, wholly in italics, we have pointed out, in the foregoing pages of this petition, the *absence* of inflammatory matter and the *absence* of vile epithets emanating from appellant. Does this Court have in mind incidents *other than those recited in the opinion*? If so, what are they and why has this Court neglected to mention them?

When it comes to the matter of epithets it seems to us that they are to be found in the charges made by the trial Court against appellant. They are in fact epithets because they assume and charge things against appellant where an examination of the record discloses that such assumptions and charges are without foundation. By making such unfounded assumptions and charges the trial Court has resorted to "name calling". Name calling, particularly where there is no factual basis for the name called, is what we understand an "epithet" to be. Moreover, while there is nothing vile in the words employed by the trial Court in making such assumptions and charges, it seems to appellant that such name-calling is *exceedingly vile in its effect* in that it is made the basis and the justification for sending him to jail for a period of six months under the stigma of criminal contempt. Moreover, appellant's characterization of the witnesses whom the prosecution would call were not nearly as inflammatory or nearly as abusive as the charges made by the prosecutor in his opening statement that the three defendants and the witnesses whom they would call (divers persons to the Grand Jury unknown) were members of the Communist

Party and perjurers and had conspired to commit perjury and to defraud the government. The charge of "Communist" today is not only inflammatory, it is in the popular mind of the people of this country a charge of perfidy, a charge of treason, a charge that the person desires to overthrow our government by force and violence, by trickery and deceit, and deliver the people of our nation into the slavery of a cruel, ruthless, unprincipled, godless and god-hating dictatorship. The opening statement of the prosecutor in this case, in effect, asked the jury to look at the three defendants and at all of their witnesses for horns and cloven hoofs and forked tongues.

**B. NO WITNESSES WOULD BE PERMITTED TO HURL
THE EPITHETS, ETC.**

The prosecutor in his opening statement charged the defendants with perjury, with conspiracy and with having defrauded the government. "No witness would be permitted" to testify that the defendants did commit perjury or did commit conspiracy or did defraud the government. That is to say, such witnesses would not be permitted to so testify *using* the *epithets* (i.e. *the words*) perjurer, conspiracy and defraud. In this sense, but only in this sense, is it true "that no witness would be permitted to hurl the epithets" used by appellant. Every charge appellant made against the prospective prosecution witnesses was capable of being proved so **in full substance** and by competent, relevant and material evidence. That

this is so all this Court has to do is to read the decision of the Supreme Court of the United States and the concurring opinion of Mr. Justice Murphy in the case of *Bridges v. Wixon*, for, in effect, every characterization that appellant made of the prospective witnesses was made by members of the Supreme Court of the United States in the case of *Bridges v. Wixon*.

C. APPELLANT'S OPINION.

Let us repeat two statements contained in the above quotation from this Court's opinion.

"The most abusive language used and the vilest characterizations made *were not in the form of a statement of what was expected to be proved*, but a direct statement by appellant of *his opinion* of the witnesses "and" he could not validly say that he would prove the statements made * * *"

These statements will bear painstaking analysis. They are windows in this Court's mind through which the mental processes of this Court can be viewed. And the mental processes in this instance run counter to the fundamental principles of the law of our land.

The defendant Bridges **knew**, not *thought* but **knew**, whether he was or ever had been a member of the Communist Party. If he was not and had not been a member of the Communist Party, he *knew*, not as a matter of opinion but as a matter of **absolute knowledge**, that no person *could* testify that he was or had been a member of the Communist Party *without com-*

mitting wilful and deliberate perjury. Under such circumstances, he *knew* also, and *knew positively*, that if two or more persons testified to the *same* incidents or acts of participation as showing that he was a member of the Communist Party those two or more persons were not only committing *perjury*, but that *they had conspired to commit perjury.* In addition, the defendant Bridges *knew* who the witnesses were who had testified against him in the two previous deportation proceedings. He *knew* what their testimony had been. He *knew* their histories and their background. He *knew* what Landis and Sears and Biddle and the justices of the U. S. Supreme Court had said about their character and credibility, and he **knew** to a **normal certainty** that only witnesses of the type, kind, background and character of those who had theretofore testified against him **could** be produced by the prosecution on the present trial.

At the trial the *law presumed* Bridges to be *innocent*. Appellant was the attorney of and spokesman for the defendant Bridges. *Appellant was in Court in no other capacity.* Because of this relationship of attorney and client, *Bridges' knowledge* became **appellant's knowledge**, not as a matter of fact but a matter of *positive law*, in so far as such knowledge was disclosed to appellant by Bridges. Indeed, even where such a defendant *lies* to his attorney by claiming innocence where he is in fact guilty, the law vests in the attorney, indeed, **imposes upon him**, for the purposes of the trial, a **knowledge that his client is innocent.**

As Bridges had pleaded “not guilty” it **must** be presumed that he had told appellant that he was not guilty and it **must** be presumed that appellant believed that Bridges was not guilty.

For the foregoing reasons the characterizations which appellant made of the prospective prosecution witnesses were not matters of *his own personal opinion* of those witnesses, but were matters of his **knowledge** concerning them: matters of his *knowledge* not only by legal presumption but also *by legal compulsion*.

The statement by this Court to the effect that such characterizations were only a statement of appellant’s *opinion* is tantamount to a holding that the defendant Bridges had no knowledge of being innocent of the charges against him and had conveyed no such knowledge of innocence to appellant. It is tantamount to a holding that the defendant Bridges *was guilty* of the charges against him and that appellant had no basis, *other than personal opinion*, for a *belief* that Bridges was innocent.

In this connection we think it important to direct this Court’s attention to a statement made by the trial Court in its preface to its oral finding that appellant was guilty of criminal contempt, wherein the trial Court, by unmistakable implication, *accused both Bridges and appellant of being Communists*, or, in other words, evidenced a pre-judgment *of Bridges’ guilt and of appellant’s knowledge thereof*.

Commencing near the bottom of page 774 of the transcript the trial Court said:

“I say to you, Mr. Hallinan, long after the case of *United States v. Harry Bridges* has become judicial history, long after this Court has gone to whatever happy reward judges may have, these courts will remain as beacons in our judicial system, wherein, we hope, expect and pray that the rights of men may be adjudicated without regard for station in life or race, color or creed.

“However, there is an anomaly apparent throughout the country today and *exemplified*, perhaps in some of our more recent trials, in that those who cry so earnestly for protection under the mantle and cloak of our Constitution of the United States would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system. If I permitted this matter to go on unheeded, it would, in my opinion, represent a tragic commentary on our system, orderly as it is, in the administration of justice.”

The only possible pertinency of the trial Court's remark about “those who cry so earnestly for protection under the mantle and cloak of our Constitution” was to *accuse appellant* of being in that class and of being in the class of those who “would at the same time destroy and seek to destroy every vestige of decency and judicial goodness and sanctity inherent in the federal judicial system”. The reference to recent trials was obviously a reference to the recent trial of a number of high-ranking Communists in New York (*U. S. v. Dennis*) wherein similar charges were made. Thus these statements by the trial Court *accused appellant, in effect, and by unmistak-*

able implication, of being a Communist lawyer of a Communist client.

It seems to us that this Court's statement to the effect that appellant's characterizations were but his opinions is indicative of the same state of mind, the same pre-judgment, the same ignoring of the presumption of innocence, the same refusal to realize that, for the purpose of trial, the *knowledge* of the defendant Bridges was, *as a matter of law*, the *knowledge*, and **not** merely the *personal opinion*, of appellant.

It is true that this matter of knowledge of appellant was *also* a matter of opinion. But insofar as it was a matter of opinion it was predicated on certain things, all of which were matters of official record in the trial Court and are of official record in this Court: they are all contained in the file of the case of *Bridges v. Wixon*, 144 Fed. (2d) 927.

What were such matters?

1. The Landis opinion in the first Bridges deportation proceeding which was bodily incorporated in the record in the second Bridges deportation proceeding.

2. The Sears opinion in the second Bridges deportation proceeding.

3. The Board of Review's opinion in the second Bridges deportation proceeding.

4. Attorney General Biddle's opinion in the second Bridges deportation proceeding.

5. The majority opinion of the U. S. Supreme Court in the case of *Bridges v. Wixon*.

6. The concurring opinion of the late Mr. Justice Murphy in the case of *Bridges v. Wixon*, and

7. Even the dissenting opinion of certain justices in the case of *Bridges v. Wixon*.

Is an opinion derived from a reading and study of such judicial and quasi-judicial documents, accepting as true the findings in such documents, an opinion which springs from the mind of the individual advocate who so reads and studies such documents? Can it be said to be an opinion *and nothing more*? *Can it be said to be an opinion the holding and expression of which is evidence of bad faith*? It seems to us, and we believe that it will seem to other members of the bench and bar, that affirmative answers to these questions are implicit and inherent in the opinion filed by this Court.

Let us turn now to this Court's statement that appellant's characterizations "were not in the form of a statement which was expected to be proved".

Does the record support this assertion? It does not.

Before appellant's opening statement had gone one transcript page appellant said to the jury (Tr. 490):

"Now, as has been said to you too, the statements of counsel in an opening statement are not evidence and cannot be accepted by you as evidence, yet it must follow, it must be taken for granted, that in making an opening statement an attorney *puts his credit at the risk of what he says in this statement. He would certainly expect to excite the animosity of the jury by saying something that he did not sincerely believe and that he did*

not sincerely expect to prove. Therefore, in what I say in the opening statement, you may take this, and I have bound myself to this obligation, that anything that we tell you we will prove conclusively by evidence introduced from witnesses upon the stand—not by any arguments, suggestions, or anything of that kind, but by clear and unequivocal evidence.

“But one might say, well, how can you assume to prognosticate so accurately what you are going to be able to do? And I will say this, that we can tell you *because it is an old story*. As has been indicated to you before,—and in suggesting this I am not going to mention the results of these matters or comment on the propriety or impropriety of them—but this is the fifth inquiry into this subject.”

On page 528 of the transcript appellant said to the Court in the absence of the jury:

“Now, if I should say to this jury that I will prove a conspiracy of this kind and at the end of it they say, ‘He has lied to us and he has deceived us,’ *is that going to help my client?* I say I will prove the conspiracy to put perjured testimony on the stand, to say that Mr. Bridges was a Communist.”

And on page 552 of the transcript appellant said to the trial Court in the presence of the jury:

“I suppose if I deceive this jury, or I say something that I can not prove to the extent that I have promised to prove it, *then my credit with the jury and the credit of the entire defense lapses. And I am willing that that should be so. Now, I can’t see how I could be more sincere than that.*”

There is much more in the statement of this Court concerning the good faith of appellant to which we could and would take exception did time permit. It will suffice for us to say that both in the foregoing and in the remaining portions of this Court's opinion concerning good faith this Court in effect overrules the United States Supreme Court's decision in the case of *Bridges v. Wixon* with respect to what is relevant and material by way of defense where the charges are as they are in this case and in effect overrules the decision of the Supreme Court of the United States in the case of *Alford v. U. S.*, 282 U.S. 687, with respect to the degree of protection which a trial Court should give to prosecution witnesses. In the latter case the United States Supreme Court on page 692 in reversing this very Court said "But no obligation is imposed on the Court, such as suggested below, to protect a witness from being discredited on cross-examination short of an attempted invasion of his constitutional protection from self-incrimination properly invoked."

IV.

THE CROSS-EXAMINATION OF GARNER.

This Court commences its discussion of this subject as follows:

"We now consider the charge of contempt as it relates to the cross-examination of witness Garner. It is charged in the certificate that 'Mr. Hallinan had launched into a dissertation upon the deportation proceedings.' The trial court in mak-

ing this statement apparently referred to a question put by appellant in the cross-examination of the witness Garner, who had identified himself as an attorney for the Bureau of Immigration and Naturalization. The question was: 'Is it your custom as an attorney for the Government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?' In response to an objection made by the Government the Court stated that no issue with respect to the prior deportation proceedings against Bridges was before the court and that what the witness had done 'with respect to matters of prior consequence' would not help determine any issue in the case before the court."

The record pertaining to the matter recited in the above statement of this Court appears on pages 705 and 706 of the transcript and is as follows:

"Q. Is it your custom as an attorney for the government to keep abreast of the current decisions of the Supreme and Circuit Court of Appeals relating to immigration matters?

Mr. Donohue. I object to the question, if Your Honor please; his custom in prior matters is not in issue. The question is what he did in this instance.

Mr. Hallinan. That would help bring out what he did here, what resulted when the ordinary course of events has been followed.

The Court. I remark and I reiterate, Mr. Hallinan, as I did with your colleague, Mr. MacInnis, that there is no *issue* with respect to the deportation proceedings before this Court, there is no *issue* upon which the Supreme Court decision

would be controlling as a matter of fact or as a matter of law. Now, what this man may have done with respect to matters of prior consequence would not aid or determine any issue in this case.

Mr. Hallinan. Of course, Your Honor, we will still have to go ahead and offer such evidence, attempt to adduce such matters on cross-examination, as we may feel advised. And while, of course, we are bound by the rulings of the Court, we can not afford to fall into the folly of refraining from asking questions which we deem proper, and having a ruling upon them, so as to preserve a correct record. Now, I understand that an objection was made to the last ruling, but I have heard no ruling on it.

The Court. The objection is sustained."

This Court makes no reference to the above statement by appellant. Appellant made that statement to avoid even the *appearance or suggestion* of contumacious conduct. By that statement appellant *implicitly invited* the trial Court to make a ruling forbidding appellant from asking questions of the character which he announced he was going to ask and by such a ruling affirmatively establish of record a foreclosure which could not be held of an appeal by the defendant Bridges to be too uncertain to support the claim that the ruling had in fact and in law amounted to a foreclosure. Indeed, appellant by the words " * * * of course, we are bound by the rulings of the court, * * * " *told the trial Court that should it make such a ruling of foreclosure appellant would accept it as sufficient for the preservation of the record.*

The trial Court did not accept appellant's implicit invitation to make such a ruling. The ruling made was limited to sustaining the objection to the question already asked and did not extend to future questions. By not making a ruling, such as appellant invited, the trial Court acquiesced, or, at least, *seemed to acquiesce*, in the course which appellant announced he was about to follow. Indeed, although the record does not show it, as appellant completed the statement "we cannot afford to fall into the folly of refraining from asking questions which we deem proper, *and having a ruling upon them, so as to preserve a correct record.*", the trial Court nodded his head. The reason why the record does not show this is because appellant at that time had no idea that he, himself, was then on trial or had any need to make a record for *his own*, as distinguished from the defendant Bridges, *protection*.

This Court continues its statement as follows:

"It appears that almost immediately after this ruling was made appellant asked two other questions concerning the witness's acquaintance with the decisions in the prior deportation proceedings. There followed a prolonged argument by counsel on both sides, most of which was outside the presence of the jury. The certificate quotes the reiteration, during this argument, of the Court's ruling that 'these matters of prior consequence [have] no legal bearing upon this matter.' Appellant's response to this ruling was: 'I will simply have to take the position, your Honor, that I consider very much in error your position, and I will have to continue to ask the questions and build a

record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury.' ”

The prolonged argument to which this Court refers commenced on page 706 and terminated on page 734 of the transcript—a matter of some twenty-eight transcript pages. The incident to which this Court last refers was as follows (Transcript pages 732 to 734):

“The Court. Now, we will just take that primitive notion as to that phase of the matter. You make the bland assertion that this witness on the stand, Mr. Garner, has in some manner, at some place unidentified,—

Mr. Hallinan. ‘To the grand jury unknown.’

The Court. —joined a conspiracy. When he joined the conspiracy, of course, is problematical, speculative and wholly in the limbo of uncertainty. He has joined in it some time. This unwholesome conspiracy that started in 1934?, is that the date? Or thereabouts. And that this chain of co-conspirators that is gained and augmented in force and number, until now it reached the proportions of 125 people, all of them, all of them are out of step with Harry Bridges.

Now, to ask this Court to relax the vigilance which is traditional under the rules of evidence as I learned them, and as I think we both learned them together, would be *in my opinion* to broaden the scope to a point of unheralded dominion, and to a point wherein there would result prejudice to the prosecution as well as to the defendants at bar. *I think*—

Mr. Hallinan. I will simply have to take the position, Your Honor, that I consider very much in error your position. And I will have to continue to ask the questions and build a record and ask such questions as I may deem advised, and I say that you have no right to make your mind up as to whether a conspiracy of these witnesses exists or does not exist; that that is something direct to the jury.

The Court. You ask me to relax the rules of evidence upon that basis, and I say to you that I am not going to relax the elemental rules of evidence that apply on cross-examination of this witness.

Mr. Hallinan. Why, I have read off the rules, Your Honor, and it is not a question of asking you to relax them, it is a question of whether you will restrict them and whether you will put a new circle around the rules of evidence and say that certain questions that are proper to be asked may not be asked. That is the point. It isn't a question of asking you to relax them, it is a question of protesting against an improper stricture of the rules of evidence.

The Court. Mr. Hallinan, you have my ruling. You may call the jurors."

This Court quotes appellant's statement about continuing to ask questions as though it were an act of defiance of the trial Court. It was nothing of the kind. It was a *renewal* of appellant's previous *implicit invitation* to the trial Court to make a ruling *explicitly* forbidding appellant to ask questions along the line indicated by him: questions which appellant said he would *have to ask to build a record*.

Again the trial Court failed to make such a ruling.

It is true that in those incidents appellant's statements were argumentative in form. But not one bit more argumentative in form than were the statements of the trial Court. This Court has accurately described the twenty-eight pages of the record as being "a prolonged argument", but it was not only "by counsel on both sides", as this Court says, but one in which the trial Court participated *with equal argumentativeness, as the above excerpt from the record plainly reveals*. Moreover, the argumentative portion of such argument took place in the absence of the jury.

This Court continues its discussion as follows:

"The record discloses that the very first question asked the witness Garner by appellant after the jury was reseated was: 'If you did not read all the decision of the Supreme Court, at least you read most of it, is that right?' Objection was made and sustained. The question immediately following was: 'Now, did you read that portion of the decision of the Supreme Court of the United States which charged the federal agents with illegal wire-tapping of Harry Bridges?' Objection was made and sustained."

We have no complaint with what the Court says in this paragraph, but we have a serious complaint concerning what this Court leaves out between the end of this paragraph and the beginning of the next one.

The two questions, objections and ruling mentioned in this paragraph occur on pages 734 and 735 of the transcript and were followed immediately, on pages 735 and 736, by this:

"Mr. Hallinan. Q. Have you any independent knowledge—now, aside from any designation of

any court—have you any independent knowledge of your own or information from any person in the government's employ that at any time during the course of this proceeding or of the previous—We will withdraw that—the course of this proceeding, any wire-tapping was done on Harry Bridges' telephone?

Mr. Donohue. I object, if Your Honor please, and now suggest to Your Honor that it would appear from the fact that Mr. Hallinan has intentionally asked three questions, all in my judgment contrary to the ruling of this Court, that he is doing exactly what he said he would do, and that is, despite Your Honor's ruling, he would continue to ask these questions for the purpose of preserving some kind of record. I ask that he be admonished at this time not to continue this line of questioning.

Mr. Hallinan. May I be heard in that, Your Honor? As I understand it,——

The Court. Just a moment, Mr. Hallinan. The objection is sustained, the jury is admonished to disregard it.

Mr. Hallinan. Your Honor, this does not relate to any hearing, this means presently and now. I want to know if this gentleman indulged in any illegal activity in connection with procuring a verdict in this case.

The Court. You had it in a two-way thrust before.

Mr. Hallinan. I withdrew that. I said I withdrew that.

The Court. You may answer the question."

Here we find Mr. Donohue, the chief prosecutor, *explicitly requesting* the trial Court to make a ruling of

the character which appellant had twice before *implicitly* invited. The trial Court ignored Mr. Donohue's *explicit* request just as it had twice before ignored appellant's *implicit* invitation. Why? There is only one possible answer. Because the trial Court wanted **not** to make any such broad ruling of exclusion. That this is so is made manifest by the fact that *in this very instance* the trial Court, after his sustaining the objection to the question, reversed itself and **permitted the witness to answer**.

What does this signify? It signified that **none** of the previous rulings of the trial Court *had been intended by the trial Court* to foreclose appellant from asking any and all questions along "this line", to use the expression of Mr. Donohue. And it signified that the *trial Court did not intend its ruling in this instance* to have any such broad prohibitory effect.

What did this mean to appellant? It meant that *only* by continuing to ask questions along "*this line*" could he make the record show *just how broad* the Court's ruling of exclusion was.

Appellant was concerned with having the record show *not only error* in the limitation placed upon the cross-examination of the witness Garner with respect to his credibility, but such *drastic error* that an Appellate Court could not say, on an appeal by Bridges, *that the error was not prejudicial*. He had a right to do this. Indeed, he had a duty to the defendant Bridges to do this. Not only a moral duty but a *legal duty*:—*a duty imposed upon him as an officer of the Court*. He could do this only by continuing to ask

“this line” of questions until he felt certain, based upon his knowledge of *how frequently* Appellate Courts are of the opinion that what appears to the trial lawyer to be *prejudicial* is only *harmless* error, that the error in this instance was *so grave* and was *so apparent* that it *could not be dismissed as harmless* by the Appellate Court.

It is because appellant tried to discharge this obligation that he now finds himself adjudged guilty of criminal contempt.

To return to this Court’s opinion this Court continues as follows:

“Later came a question with respect to the witness’s knowledge of wire-tapping prior and up to the time that Bridges was admitted to citizenship. Objection to this question was made and sustained. Another question concerned the witness’s knowledge of wire-tapping at the time of the two previous deportation proceedings. Objection was made and sustained and the jury admonished to disregard any implications in the question. The witness was asked by appellant whether he had had any knowledge of wire-tapping before the deportation proceedings, whether he had protested against illegal wire-tapping, whether he had stated to any government official that he would not be a party to an illegal effort to injure Bridges. Objections to all these questions were sustained.”

Let us look at the last of the incidents mentioned in this portion of the opinion. The record (pages 739 and 740 of the transcript) reads as follows:

Mr. Hallinan. Q. Did you at any time in the course of your connection with this case state to any official or agent of the government that you would not be a party to an illegal effort to injure this man?

Mr. Donohue. I object to the question, if Your Honor please, and I again ask Your Honor to admonish counsel to confine his cross-examination to that well established rule of law to which Your Honor invited his attention just a few moments ago.

The Court. The objection is sustained."

Here we find Mr. Donohue *again* asking the trial Court to admonish appellant not to ask questions along the same "line" and we find the trial Court *again* failing to comply with the prosecutor's request.

This Court continues:

"The witness was then asked whether he had read in one of the prior deportation proceedings that 62 government witnesses had been rejected by the trier of fact as liars and perjurers. The objection to this question was also sustained. It was followed by an almost identical question with reference to a different prior deportation proceeding."

Let us look at the second of these two incidents (Tr. pp. 741-742):

"Q. Now, getting away from these two proceedings that seem to involve me in so much criticism, you do know this, that 60 witnesses, different from those that testified before Landis, testified before Sears and that Sears rejected all but one of them as liars and perjurers; isn't that right, Mr. Witness?

Mr. Donohue. I again object——

Mr. Hallinan. Might I be heard on this, Your Honor?

Mr. Donohue. ——and I again ask Your Honor to instruct counsel that he confine his questions to the limitations set by Your Honor just a few minutes ago, and suggest to Your Honor that his failure to do so is only a deliberate and purposeful plan on his part to call to the attention of the jury matters which as a matter of law Your Honor has said may not be properly called to their attention.”

There then followed a long statement by appellant at the end of which on page 744 the trial Court said:

“The objection is sustained.”

Thus **three times** did the prosecutor **explicitly** request the trial Court to make a ruling which would foreclose appellant from asking questions along the same “line” and thus **in each of these three instances** did the trial Court *refuse* the request *by failing to take notice of it*.

This Court then makes mention of three other questions, objections and rulings sustaining the objections. They were questions along the same line but directed to different phases or different incidents. They need not be particularly discussed.

There is one more excerpt which we desire to quote from the record, however. As the witness Garner was about to leave the stand (Tr. pp. 753 to 755) the following occurred:

“Mr. Hallinan. As I understand it, your Honor, there are questions, as I said, I wanted

to ask this witness out of those two opinions and I suggested, since I didn't want to make it appear even that I was transgressing upon the court's ruling, that this witness would be further cross-examined in the absence of the jury. Isn't that the rule that you made? Isn't that what you said would be done? Otherwise what I want to do is ask specific questions now out of those two documents and ask him whether those are parts of the things that he said he read in them. I do not want to seem to be showing bad faith. I could probably ask them before the jury and allow objections to be sustained, but I do not want to entrench even on the spirit of the court's ruling.

Mr. Paisley. Your Honor, it has always been my understanding that once counsel understands the court's ruling as to allowing testimony, he cannot stand up before the court and repeatedly ask the same questions over again.

The Court. I know of no such rule that would permit Mr. Hallinan to adopt that course of procedure or practice.

Mr. Hallinan. Might I suggest this, your Honor: If not then, I would have to ask them in the presence of the jury, and then that is going to excite some argument. I want to ask the witness now—I want to read off portions of the decision of the Supreme Court and Judge Landis' decision and ask him if those were parts that he read before he asked these two defendants whether or not they were members of the Communist Party. I want to ask him the specific things because he says he does not believe he read them all, that he read excerpts from them. I want to find out what those excerpts were and whether those excerpts would bear upon the probability as that he then

asked these other questions. I have to, to be consistent, ask those questions. If you wish, I will go ahead and ask them in the presence of the jury, unless you will tell me now, if you wish, that I will not be permitted to ask any such questions, and then I will just make an offer of proof and let it go at that.

The Court. Counsel, thus far you have not had much regard for my rulings, whether I made them formally or informally, in the presence of the jury or in the absence of the jury. It is a sort of travesty at this late stage again to tell me about it. Do you have an objection to it, counsel?

Mr. Paisley. I certainly do, your Honor.

The Court. The objection is sustained.

Mr. Hallinan. There isn't any question, your Honor, to which an objection could be made.

The Court. I thought there was."

Here we find appellant explicitly suggesting to the trial Court that it make an explicit ruling and we find the trial Court avoiding to make such an explicit ruling even at this late stage by accusing appellant of not having shown "much regard" for the rulings of the trial Court "whether I made them formally or informally".

The latter statement by the trial Court expresses the defect in the heart of the charge of contempt made against appellant. The trial Court's complaint was that appellant had not shown "much regard" for the informal rulings of the trial Court. That is those expressions of opinion which do not amount to rulings as far as the case of the defendant Bridges was concerned. The trial Court was try-

ing to control the course of the trial not by making rulings which the defendant Bridges could make use of on appeal but by placing a personal pressure on appellant in his status as an officer of the Court as distinguished from his status as the attorney for the defendant Bridges.

This Court continues its discussion of this subject as follows:

“Appellant extensively argues the general propriety of bringing in the defenses disclosed by the above related questioning. *The vice found here is not in bringing in the defenses but the manner in which it was attempted to be accomplished.* All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial Court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere. But, argues appellant, before the alleged error can be considered elsewhere, the record *must be sufficiently explicit* to enable a reviewing court to understand the nature and purpose of the excluded evidence. *With this statement we are in entire agreement* but are unable to find in the record before us justification for the conduct of appellant on that ground. We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made

long before appellant desisted.” (Emphasis added.)

In view of the fact that the trial Court on **six separate occasions** (the first at the beginning of appellant’s cross-examination of the witness Garner, and the last at the end of that cross-examination), *patently avoided* the making of an *explicit* ruling, what basis is there for this Court’s holding to the effect that the trial Court *did make an explicit ruling*? We submit that there is not only *no* basis for such holding, but that the record *affirmatively establishes* that there is *no basis* for such holding. We submit, also, that in view of the fact that the trial Court six times avoided the making of such a ruling and in one instance permitted the witness to answer a question along the same “line”, reveals that there is *no basis* for this Court’s conclusion viz.:

“We think appellant went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter. A sufficient record was made long before appellant desisted”.

Moreover, if “a sufficient record was made long before appellant desisted” *at what point was such a record made?* More particularly, in view of the six avoidances by the trial Court to make an *explicit* ruling, *at what point could appellant have safely assumed that the non-explicit rulings up to that point made by the trial Court would be regarded by this Court as being the equivalent of an EXPLICIT ruling?*

We have one other criticism to make concerning this Court's statement in relation to appellant's cross-examination of Garner. This Court says:

"We realize the inadequacy of the cold record to fully present the situation as it existed in the courtroom during the turbulent times portrayed by this record".

It seems to us that by these words this Court admits that it has gone *beyond* the "*cold record*" to **imagine** "*the situation as it existed in the courtroom*" *in order to find justification for affirming the judgment* and, in such *imagining*, has **assumed in appellant's disfavor the existence of things not presented in the record**. In other words, we see in these words of this Court an *admission* that the conviction of appellant is being affirmed *in part* upon the basis of things *not charged in the trial Court's certificate and the existence of which appellant has had no opportunity to refute*.

V.

THE OPINION CONTRAVENES THE RIGHT OF COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

The Sixth Amendment to the Constitution of the United States provides:

"In a criminal case the accused shall enjoy the right * * * to have the assistance of counsel for his defense".

This provision guarantees to a defendant in a criminal case the right of counsel not only in name but in substance. It guarantees to him the right to the aid

of counsel who in presenting his defense is not bound by any rulings of the trial Court other than those which are so explicit as to constitute error on an appeal by him from a judgment of conviction should such rulings be erroneous. He is guaranteed the right of a counsel who is unfettered in the presentation of his defense by *expressions of opinion* by the trial Court which do not amount to rulings and unfettered by *positions* taken by the prosecutor which have not been converted by the trial Court into rulings.

This provision of the Sixth Amendment not only confers such a right upon a defendant in a criminal case but, by necessary implication (i.e., necessary to make the provision itself effective), it confers a corresponding right upon an attorney who is serving as counsel for a defendant in a criminal case. This is to say, an attorney while serving as counsel for a defendant in a criminal case is guaranteed by this constitutional provision the right to serve as such without being subjected to restraints which are not also and equally imposed upon the defendant, himself. **He has the right to perform the functions of an advocate.**

The opinion of this Court **reveals on its face** that appellant is being punished for disregarding **"opinions expressed"** by the trial Court and for disregarding a **"position taken"** by the prosecutor.

The opinion further shows on its face that appellant is being punished for having expressed opinions when, according to this Court's opinions, should not have been expressed) where the subject matter of such opinions was subject matter within the *knowledge* of the defendant Bridges and, therefore, within

the *knowledge* of appellant, for the purposes of the trial, not as a matter of fact *but as a matter of law, as a matter of legal compulsion.*

We have hereinbefore mentioned the status of defense counsel in totalitarian countries. *If this opinion is allowed to stand* it will set a precedent for divesting defendants in criminal cases of the right of counsel. It will set a precedent for a trial judge in a Federal Court to say to a defense counsel:

“I am *not going to limit you* in your presentation of the defense. I am not going to make any *ruling*, and, more particularly, I am not going to make any *explicit ruling*, to serve as a predicate for a claim of error on appeal by the defendant should he be convicted. But I am going to *express the opinion* to you as an individual that you should not raise any question concerning the character or credibility of any prosecution witness, and you should not do or say anything which runs counter to any position taken by the prosecutor with respect to how the case for the defense should be presented, and you should not give voice to anything which is within the knowledge of the defendant which is not, as a matter of fact, within your own personal knowledge, which in any way reflects upon any witness called or to be called by the prosecution, and I am going to warn you that if you do not comply with this *expression of opinion* as fully as you would if it were an explicit order binding upon the defendant, I am going to find *you* guilty of criminal contempt and I am going to sentence *you* to jail for a period of six months and I am going to order *your* name stricken from the roll of attorneys permitted to practice in this Court”.

We raise this point, and especially set up and claim it, in this petition in order to preserve our right to raise this point in an application to the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied.

VI.

THE OPINION CONTRAVENES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The only hearing accorded to appellant as a matter of right by the law is a hearing on appeal in this Court.

The opinion of this Court, *if it is allowed to become the decision of this Court*, will have the effect of depriving appellant of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It will do so by granting to appellant a hearing *in form only* and by denying him a hearing in substance and on the merits.

It will do so by accepting the charges made by the trial Court as true where the record not only does not sustain such charges **but affirmatively establishes that such charges are false.**

We contend that this transcends mere error, that it transcends an error in judgment or in the exercise of discretion, that it constitutes a positive violation of appellant's constitutional right to be accorded due process of law before being deprived of his liberty.

We raise this point and especially set up and claim it in order to preserve our right to raise this point in an application in the Supreme Court of the United States for a writ of certiorari should this petition for a rehearing be denied.

VII.

THIS COURT SHOULD GRANT A REHEARING IN THIS CASE BECAUSE THIS COURT IN THE PRESENT OPINION HAS FAILED TO PASS ON OR MENTION THE APPEAL OF APPELLANT FROM THE ORDER OF THE TRIAL COURT STRIKING THE NAME OF APPELLANT FROM THE ROLL OF ATTORNEYS PERMITTED TO PRACTICE AS ATTORNEYS IN THE TRIAL COURT.

VIII.

THIS COURT SHOULD GRANT A REHEARING IN THIS CASE BECAUSE IT HAS FAILED IN THE PRESENT OPINION TO PASS UPON THE ISSUE RAISED BY APPELLANT THAT THE TRIAL COURT, BY REASON OF LAPSE OF TIME HAD LOST JURISDICTION TO CERTIFY APPELLANT IN CRIMINAL CONTEMPT UNDER RULE 42(a) FOR MATTERS OCCURRING DURING THE OPENING STATEMENT.

IX.

THIS COURT SHOULD ACCORD A REHEARING BECAUSE THE OPINION OF THIS COURT IS IN CONFLICT WITH THREE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, VIZ.:

(1) With the decision of the Supreme Court of the United States in the case of *Bridges v. Wixon*, 326 U.S. 135, with respect to what is



